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Where Do We Go from Here: The Federal Coal Leasing Amendments Act--Past, Present, and Future

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WHERE DO WE GO FROM HERE?: THE FEDERAL COAL LEASING AMENDMENTS ACT — PAST, PRESENT, AND FUTURE

SAM KALEN*

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I. INTRODUCTION

First of all, we must move more aggressively to utilize the vast coal reserves in our country.

President Jimmy Carter.¹

The current federal coal program celebrates its twentieth anniversary on August 4, 1996. Aside from the mining of valuable mineral deposits from federal lands, an area so weathered that time has little meaning, the federal coal program stands almost alone as lasting longer than the other principal federal resource/energy programs. In 1987, for example, Congress amended the Mineral Leasing Act by passing the Federal Onshore Oil and Gas Leasing Reform Act of 1987.² The Geothermal Steam Act of 1970³ was amended with the passage of the Geothermal Steam Act Amendments of 1988.⁴ And in 1992, Congress addressed various programs in the Energy Policy Act, including coalbed methane, oil shale, and federal lignite royalties in the Fort Union area of North Dakota.⁵ That we even speak separately of a federal coal program, an oil and gas program, a geothermal program and a hardrock mineral program is quite telling. The reason has more to do with history than anything else. It reflects piecemeal congressional responses to particular interests and issues as they developed.⁶

Currently, the antiquated hardrock mineral program is receiving national scrutiny.⁷ Not so with the federal coal program, which still

1. President Jimmy Carter, The President's News Conference of April 10, 1979, Week. Comp. Pres. Doc. 648 (1979).

2. Pub. L. No. 100-203, 101 Stat. 1330. See generally Patricia J. Beneke, *The Federal Onshore Oil and Gas Leasing Reform Act of 1987: A Legislative History and Analysis*, 4 J. MIN. L. & POL'Y 11 (1988); Thomas L. Sansonetti & William R. Murray, *A Primer on the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and Its Regulations*, 25 LAND & WATER L. REV. 375 (1990). Five years earlier Congress had enacted the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757 (1994). In 1981, Congress passed the Combined Hydrocarbon Leasing Act of 1981, Pub. L. No. 97-78, 95 Stat. 1070 (codified at 30 U.S.C. § 226(b)(1) (1994)).

3. 30 U.S.C. §§ 1001-1027 (1994).

4. Pub. L. No. 100-443, 102 Stat. 1766 (1988).

5. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992).

6. For an interesting insight into the events surrounding the development of oil and gas regulation, see Laura Lindley, *Of Teapot Dome, Wind River and Fort Chaffee: Federal Oil and Gas Resources*, 10 NAT. RESOURCES & ENV'T 21 (1995).

7. See generally JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MO-*

operates in accordance with the Federal Coal Leasing Amendments Act of 1975 (FCLAA).⁸ The longevity of FCLAA is remarkable, but whether it reflects a sound policy that will carry us into the next century is an issue worth exploring. This article attempts to lay the foundation for such an examination by briefly canvassing the events and circumstances animating the passage of FCLAA, and then summarizing the primary provisions and subsequent regulatory implementation of the Act, with a focus on those aspects of the federal coal program that were designed to discourage speculation and spur development.

While various provisions of FCLAA reflect the goals of an energy/natural resources policy that flourished in the mid 1970's, how those policies became translated into particular statutory—and ultimately regulatory—provisions may or may not make sense twenty years later. This article, therefore, concludes with some preliminary observations about the continued efficacy of FCLAA, tentatively suggesting that, while in hindsight the underlying concern prompting passage of FCLAA may be questionable, the anti-speculative and diligence provisions in FCLAA may still serve important natural resource policy objectives.

II. BACKGROUND

The beginning of the federal coal program extends back to the middle nineteenth century. In 1864, Congress provided for the sale of coal lands at \$20 per acre, later changed, in 1873, to a lesser amount, depending upon the distance to the nearest railroad tract.⁹ As a promi-

TION (1987); CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST* 28-74 (1992).

8. Pub. L. No. 94-377, 90 Stat. 1083 (1976). Congress passed very limited amendments to FCLAA in 1978 and 1985. Pub. L. No. 94-377, 90 Stat. 1090 (1978) (allowing modification of leases to include an additional 160 acres of contiguous lands, without triggering a readjustment and the accompanying FCLAA requirements); H.R. REP. NO. 1635, 95th Cong., 1st Sess. 3 (1978); *see also infra* note 58.

9. 13 Stat. 343 (1864), *amended by* 13 Stat. 529 (1865), *revised by* Coal Lands Act of March 3, 1873, 17 Stat. 607 (codified at 30 U.S.C. §§ 71-76 (1994)). *See* Effie A. Hard, 44 I.D. 479 (1915); *see generally* PAUL W. GATES, *HISTORY OF PUBLIC LAND DEVELOPMENT* 724 (1968); BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 518 (1965); *see also* CELIA CAMPBELL-MOHN, BARRY BREEN & J. WILLIAM FUTRELL, *ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY* 644-47 (1993) [hereinafter CAMPBELL-MOHN]. The General Land Office Appropriation Act of 1876 required the classification of coal lands, as well as other land categories. HIBBARD, *supra* at 497. Most of the coal lands in the east, along the Appalachians, had already passed out of federal ownership.

nent public land historian notes, during the latter half of the nineteenth and early twentieth century, "the fuller recognition of the vital importance of the coal deposits caused a revamping of the coal land laws."¹⁰ The Secretary of the Interior, for example, beginning in 1906, withdrew valuable coal lands from entry, at the request of President Roosevelt who publicly expressed concern over the administration of such lands.¹¹ Congress assisted this effort in 1910 when it passed the Pickett Act, governing the withdrawal of these and other lands.¹² As of June 30, 1923, almost thirty-five million acres had been withdrawn west of the 100th meridian.¹³ However, in the majority of the remaining areas, coal deposits within lands classified as coal lands could still be purchased either under the coal land laws upon application or through a preference system.¹⁴

On February 25, 1920, Congress passed what is now known as the Mineral Leasing Act (MLA),¹⁵ governing the disposition by lease of coal and other specified mineral resources, such as oil and gas. The

Id. at 516-17. In many areas, moreover, the railroad land grants created a checkerboard pattern of federal and non-federal coal lands. See GENERAL ACCOUNTING OFFICE, REPORT TO THE SECRETARY OF INTERIOR: COOPERATIVE LEASING OFFERS INCREASED COMPETITION, REVENUES, AND PRODUCTION FROM FEDERAL COAL LEASES IN WESTERN CHECKERBOARD LANDS (April 1982).

10. HIBBARD, *supra* note 10, at 517. Coal served as the predominant energy source from the mid 1880s until the mid-twentieth century. EXECUTIVE OFFICE OF THE PRESIDENT, THE NATIONAL ENERGY PLAN 1-2. (1977) [hereinafter NEP]. See also JOHN G. CLARK, ENERGY AND THE FEDERAL GOVERNMENT: FOSSIL FUEL POLICIES 1900, 3-12 (1987). Coal production, unable to compete with natural gas and petroleum, declined after the World War II. Mel Horwitch, *Coal: Constrained Abundance*, reprinted in REPORT OF THE ENERGY PROJECT AT THE HARVARD BUSINESS SCHOOL, ENERGY FUTURE 82 (Robert Stobaugh & Daniel Yergin Eds. 1979). See generally A. Dan Tarlock, *The Making of Federal Coal Policy: Lessons for Public Lands Management From a Failed Program*, An Essay and Review, 25 NAT. RESOURCES J. 349 (1985).

11. GATES, *supra* note 9, at 726-30.

12. CAMPBELL-MOHN, *supra* note 9, at 645; HIBBARD, *supra* note 9, at 520; GATES, *supra* note 9, at 726-30. See also Act of June 22, 1910, § 3, 36 Stat. 583; Act of June 25, 1910, 36 Stat. 847; Agricultural Entries of Coal-Lands Act of June 22, 1910, 39 I.D. 179-88 (1910). Cf. 30 U.S.C. §§ 81-88, 90 (1994).

13. HIBBARD, *supra* note 9, at 522.

14. 30 U.S.C. §§ 71-76 (1994); Coal-Land Laws and Regulations Thereunder, 46 I.D. 131 (1917). In 1914, Congress authorized the leasing of coal in Alaska. Act of Oct. 20, 1914, 38 Stat. 741, later amended by Act of March 4, 1921, 41 Stat. 1363, repealed by Act of July 2, 1958, 72 Stat. 351, amended by Act of Sept. 9, 1959, 73 Stat. 490. E.g., Alaska Anthracite Coal Co., 44 I.D. 9 (1915).

15. Mineral Lands Leasing Act of 1920, Pub. L. No. 146, ch. 85, 41 Stat. 437 (1920).

MLA authorized the granting of prospecting permits for “unclaimed” lands.¹⁶ With the passage of the MLA, rights to federal coal could be obtained only through lease, either competitively or non-competitively under a preference right system. Where valuable coal deposits were known to exist in an area, the Interior Department (the Department) issued leases by competitive coal bidding. In other areas, the Department could exercise its discretionary authority and grant a two year permit, which could be extended, to engage in coal prospecting over “unclaimed” and “undeveloped” land. If the prospector discovered coal and applied for a preference right coal lease, the Department would issue a lease if it determined that coal had been discovered in “commercial quantities.”¹⁷ From the passage of the MLA until the early 1970s, the Department issued coal leases on a case-by-case basis, without much scrutiny.¹⁸

16. 30 U.S.C. § 201(b), *repealed* 90 Stat. 1083, 1085. For a discussion of “unclaimed” lands, see M-36893, *The Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits for Coal and Phosphates*, 84 I.D. 442 (1977), *supplemented by* 86 I.D. 627 (1979), *supplemented by* M-36893 (Supp. II), *Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits and Preference Right Leases for Coal and Phosphates* (Modifying Solicitor’s Opinion M-36893 of Aug. 2, 1977; and its Supplement of Nov. 19, 1979, Upon the Same Subject): *The “Unclaimed, Undeveloped” Issue*, 88 I.D. 247 (1981). This Solicitor’s Opinion concluded that a coal prospecting permit could be issued only for “unclaimed” lands — that is, public lands not already subject to a purportedly valid mining claim. This conclusion meant that non-competitive preference right leases could be issued only for such “unclaimed” lands. The 1981 Solicitor’s Opinion modified the prior opinions by concluding that “it is the existence of adverse valid, vested claims or rights at the time of prospecting permits which is determinative.” Solicitor’s Opinion M-36893 (Supp. II), *supra*, at 251.

17. NRDC v. Berklund, 609 F.2d 553, 555-56 (D.C. Cir. 1980). Not until May, 1976, did the Department promulgate regulations defining “commercial quantities.” *See id.* at 555 n.3; *see also* Utah Int’l, Inc. v. Andrus, 488 F. Supp. 962, 968 (D. Utah 1979). The environmental community was successful in its effort to ensure that the Department complied with the National Environmental Policy Act and that environmental costs would be considered in the definition of commercial quantities. *Berklund*, 609 F.2d at 555 n.3, 558. *See also infra* note 27.

18. *See* John D. Leshy, *Non-NEPA Legal Aspects of Federal Coal Leasing and Development Policy: An Environmental Attorney’s Analysis*, 9 NAT. RES. LAW 495, 496 (1976); John L. Watson, *The Federal Coal Follies—A New Program Ends (Begins) A Decade of Anxiety?*, 58 DEN. L. J. 65, 78 (1980). In 1947, Congress passed the Mineral Leasing Act for Acquired Lands, closing a then existing gap in lands available for coal leasing, 30 U.S.C. §§ 351-359 (1994). For a review of federal coal leasing under the MLA, *see generally* COLLEGE OF LAW, UNIVERSITY OF UTAH, LEGAL STUDY OF COAL RESOURCES ON PUBLIC LANDS: PREPARED FOR THE PUBLIC LAND LAW REVIEW COMMISSION (1968).

III. CONCERN OVER SPECULATIVE FEDERAL COAL HOLDINGS

This virtually unplanned and unsupervised coal leasing program became a matter of interest, first when Congress and the Department began focusing on better management and development of public lands and natural resources, and then even more so once the effects of the energy crisis became pronounced.¹⁹ During the early 1970s, the Nixon Administration and Congress expressed concern over the prospect that large reserves of coal were being held without any evident intention to develop those reserves. In 1970, the Department prepared a report on "Holdings and Development of Federal Coal Leases,"²⁰ and proposed regulations designed to address whether coal production in an area was likely to occur or whether applicants were simply tying up considerable federal land, possibly for speculative purposes.²¹ With over 50% of the nation's recoverable coal reserves on federal land, this inquiry

19. See generally C. PETER GOPLERUD III, *COAL DEVELOPMENT AND USE: THE LEGAL CONSTRAINTS AND INCENTIVES* (1983); DR. ROBERT NELSON, *THE MAKING OF FEDERAL COAL POLICY* (1983); Carl E. Bagge, *Coal and the Nation's Energy Future*, 15 HOUS. L. REV. 1081 (1978); Forum, *The New Values of Coal*, 76 W. VA. L. REV. 255 (1974); Hon. Henry M. Jackson, *The Role for Greater Coal Utilization for the United States' National Energy Policy*, 29 U. KAN. L. REV. 303 (1981); Guy R. Martin, *A New Program for the Management of Federal Coal Reserves*, 82 W. VA. L. REV. 1019 (1980); Hon. James A. McClure, *Energy Independence Through Increased Utilization of American Coal: Goal of the 98th Congress*, 86 W. VA. L. REV. 687 (1984); Hon. Jennings Randolph, *Coal: The Coming Decade*, 82 W. VA. L. REV. 835 (1980); Gov. John D. Rockefeller IV, *A Common Sense Approach to Coal's Role in Resolving America's Energy Crisis*, 82 W. VA. L. REV. 841 (1980); A. Dan Tarlock, *Western Coal in Context*, 53 U. COLO. L. REV. 313 (1981). For a summary of the coal leasing program in the broader context of natural resource protection and development in the 1970's, see generally CONGRESSIONAL QUARTERLY, INC., *THE BATTLE FOR NATURAL RESOURCES* (1983) (CEQ); Frank Gregg, *Public Policy: Controversial Beginnings for the Third Century*, reprinted in *GOVERNMENT AND ENVIRONMENTAL POLITICS: ESSAYS ON HISTORICAL DEVELOPMENT SINCE WORLD WAR II*, 41-181 (Michael J. Lacey Ed. 1991).

20. See GOPLERUD, *supra* note 19, at 11. An Assistant Secretary for Land and Water Resources within the Interior Department during the 1970's explained that the Department had "allowed various companies to . . . take advantage of a loophole in their requirements to develop and produce continuously and diligently. We allowed them to pay minimal advance royalties in lieu of diligent development." Jack O. Horton, *The Energy Policy Game — The Odds On Independence*, 9 NAT. RES. LAW 49, 54 (1976). See also Solicitor's Opinion M-36951, *Section 2(a)(2)(A) of the Mineral Leasing Act of 1920*, 92 I.D. 537, 551 (1985) (prior to FCLAA, no limit on the number of years allowed to pay advance royalties). Cf. Garland Coal & Mining Co., 88 I.D. 24 (1981) (discussing effect of failure to pay annual rental under old leases).

21. 35 Fed. Reg. 3815 (1970).

became even more important during the ensuing energy crisis when attention focused on these untapped federal coal reserves.²² In short, as Mel Horwitch succinctly stated, “[c]oal ha[d] been rediscovered.”²³

In 1971, the Secretary of Interior imposed an informal moratorium on the issuance of any further coal leases or prospecting permits until the Department could develop a more structured program.²⁴ The moratorium became formalized in 1973, with the issuance of Secretarial Order No. 2952.²⁵ This gave the Department time to develop a new

22. BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR, HOLDINGS AND DEVELOPMENT OF FEDERAL COAL LEASES (1970); 5 COUNCIL ON ECONOMIC PRIORITIES NO. 1, LEASED AND LOST (1974). For example, western federal coal production in 1973 was half of the total western federal production only five years later. See Watson, *supra* note 18, at 74. In 1980, John Watson observed that:

[t]he United States has more energy potential lying within its borders than the total of world oil resources. . . . [C]oal makes up the greatest portion of that resource base and will undoubtedly be perceived as the most readily attainable answer to our energy woes, particularly over the next fifteen to twenty years.

Id. at 76. Between 1945 and 1970, the United States leased over 700,000 acres and had somewhere in the range of 470,000 acres subject to prospecting permits, for a combined potential of 250 billion tons of federal coal, while federal production in 1970 was only at 7.4 million tons of coal. See Leo M. Krulitz, *Management of Federal Coal Resources*, 24 ROCKY MTN. MIN. L. INST. 139, 141 (1978). See also Donald L. Humphreys, *Existing Federal Coal Leaseholds — How Strong is the Hold?*, 25 ROCKY MTN. MIN. L. INST. 5-1 (1979). The majority of federal coal leases were issued between 1960 and 1970. See *Federal Coal Leasing Policies and Regulations; Committee on Energy and Natural Resources*, 95th Cong., 2d Sess. 5 (1978) [hereinafter *Federal Coal Leasing Policies*].

23. Horwitch, *supra* note 10, at 79. Writing in 1979, Horwitch also warned that “[t]he so-called transition to coal . . . may prove difficult, if it is possible at all. True, the United States has an abundance of coal. But coal in turn has an abundance of problems.” *Id.* at 81.

24. See *Federal Coal Leasing Policies*, *supra* note 22, at 7.

25. 38 Fed. Reg. 4682 (1973). See Watson, *supra* note 18, at 78. New leases would be issued where the coal reserves were shown to meet an existing market demand or where the proposed lessee intended to develop the reserves within three years. *Id.* This limited leasing led the Department to become embroiled in litigation involving its authority to deny a prospecting permittee either an extension of such a permit or a preference right lease, as well as what test to apply when making such a determination. See *supra* note 17 and accompanying text discussing prospecting permits. Courts held that applications for new prospecting permits could be rejected. *E.g.*, *Krueger v. Morton*, 539 F.2d 235 (D.C. Cir. 1976); *Hunter v. Morton*, 529 F.2d 645 (10th Cir. 1976); *American Nuclear Co. v. Andrus*, 434 F. Supp. 1035 (D. Wyo. 1977). Conversely, however, applications for extensions of prospecting permits had to be processed. *E.g.*, *Peabody Coal Co. v. Andrus*, 477 F. Supp. 120 (D. Wyo. 1979) (although the court’s opinion appears to emphasize BLM’s practice and apparent policy of processing such applications). Holders of prospecting permits could be denied preference right coal leases, unless they found coal in “commercial quantities” — a test not formalized in regulations until May 1976. See, *e.g.*, *NRDC v. Berklund*, 458 F. Supp. 925 (D.D.C. 1978), *aff’d*, 609 F.2d 553 (D.C. Cir. 1980); *Utah Int’l, Inc. v. Andrus*, 488 F.

federal coal program, as well as to prepare an Environmental Impact Statement (EIS) in accordance with the newly enacted National Environmental Policy Act.²⁶ The final EIS was released in 1975, with Secretary Kleppe proposing in January of the following year a new and ultimately short-lived federal coal leasing program called the Energy Minerals Activity Recommendation System (EMARS II), a wholly competitive leasing system.²⁷

Concurrently with EMARS II, the Secretary also announced the development of the Coal Programmatic EIS, the creation of the Northern Great Plains resource program, revisions to the coal regulations, including specific diligence requirements, and a process for consultation with the western states' governors and their staff.²⁸ The Natural Resources Defense Council (NRDC) challenged the EIS on EMARS II for its failure to address the need for additional federal coal leasing.²⁹ The

Supp. 976 (D. Colo. 1980); *Utah Int'l, Inc. v. Andrus*, 488 F. Supp. 962 (D. Utah 1980). See generally Richard B. Johns, *Federal Preference Right Coal Leases: How Much "Right" Really Exists*, 12 NAT. RESOURCES LAW 389 (1979). For a description of the Interior Department's leasing activities during this period, see generally Carl E. Bagge, *Setting National Coal Policy: Interaction Between Congress, Regulatory Agencies and the Courts*, 86 W. VA. L. REV. 717 (1984); Thomas E. Ebzery & Brent R. Kunz, *Federal Coal Leasing in the 1980s — Lessons Learned From the 1970s*, 28 ROCKY MTN. MIN. L. INST. 315 (1983); Krulitz, *supra* note 22, at 139; Martin, *supra* note 19; Brian E. McGee & Gerald E. Dahl, *The Federal Coal Leasing Waltz*, 80 W. VA. L. REV. 455 (1978). See also *supra* note 17.

26. Pub. L. No. 91-190, 83 Stat. 852 (1970), 42 U.S.C. §§ 4321-4370d (1988).

27. BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF INTERIOR, ENVIRONMENTAL IMPACT STATEMENT: PROPOSED FEDERAL COAL LEASING PROGRAM (1975). Prior to EMARS II, the Department proposed the Energy Minerals Allocation Recommendation System [hereinafter EMARS I], which had focused on government identification of appropriate leasing tracts, while EMARS II emphasized private sector tract identification. See generally *Federal Coal Leasing Policies*, *supra* note 28, at 90-93, 97-103 (reprinting the Department of Interior's new coal policy and responses to the General Accounting Office's report on federal coal resources).

28. *Federal Coal Leasing Policies*, *supra* note 22, at 7-8.

29. *NRDC v. Hughes*, 437 F. Supp. 981 (D.D.C. 1977), *amended*, 454 F. Supp. 148 (D.D.C. 1978). According to then Solicitor Krulitz, the Department expected the decision in *Hughes*, but not the sweeping injunction. Krulitz, *supra* note 22, at 142. Of course, the Department had already prevailed in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), where the Supreme Court upheld the Department's initial decision not to prepare a regional EIS; yet, by the time the Court decided *Kleppe*, the Department had proposed initiating the type of regional activity at issue in that case. See Krulitz, *supra* note 22, at 177. Because the Department had anticipated the *Hughes* decision, efforts were "well underway in developing a new leasing program for which . . . [it] would prepare a sound and legally adequate impact statement." *Federal Coal Leasing Policies*, *supra* note 22, at 11 n.15 (quoting Secretary Cecil Andrus).

court agreed and issued a fairly sweeping injunction, modified soon thereafter, ordering the preparation of a supplemental EIS adequately addressing a “no action” alternative.³⁰

Along with its review of the leasing program, the Department from 1974 through 1976 sought to establish rules under Section 7 of the MLA governing diligent development and a requirement for continuous operation.³¹ These policies became an element of Secretary Kleppe’s new coal program, EMARS II, announced in 1976.³² The Department explained that the MLA required diligent development and continued operation, which necessarily required some standard for the rate of production over a certain time period.³³ The Department apparently believed that a forty-year period was an appropriate time frame for exhausting recoverable reserves, and it further believed that the forty-year period could apply to a “logical mining unit” (LMU), which could include a single or more than one federal coal lease, as well as non-federal coal.³⁴

30. The parties ultimately settled the lawsuit, agreeing to a modification of the court’s decree. *See Utah Int’l, Inc. v. Andrus*, 488 F. Supp. 962, 973 (D. Utah 1979); Ebzery & Kunz, *supra* note 25, at 320-23. Amidst this litigation, the Department placed a high priority on developing a new program, subsequently announced in 1979. *See Martin, supra* note 19, at 1030-31. This new program followed FCLAA, and “it relied on federal coal production goals [based upon Department of Energy generated estimates], the bureau’s land-use planning process, and regional coal teams made up of state and federal officials.” *CEQ, supra* note 20, at 91.

31. 39 Fed. Reg. 43,229 (Dec. 11, 1974) (proposed logical mining unit rules for “diligent development” and “continuous operation”); 40 Fed. Reg. 60,070 (Dec. 31, 1975) (same); 41 Fed. Reg. 2948 (Jan. 19, 1976) (proposed rules for defining “commercial quantities” and “valuable deposit” for preference right leases); 41 Fed. Reg. 18,845 (May 7, 1976) (final rule for issuance of preference right leases); 41 Fed. Reg. 21,779 (May 28, 1976) (final logical mining unit rules for “diligent development” and “continuous operation”); 41 Fed. Reg. 45,571 (Oct. 15, 1976) (requesting comments on “diligent development” and “continued operation” rules after FCLAA); 41 Fed. Reg. 56,643 (Dec. 29, 1976) (final rules after FCLAA). The pre-1970 Coal Lease form 3130-1 included a clause that provided that leases would continue “upon condition of diligent development and continued operation of the mine or mines” (with exceptions), and that operations either would be continuous or the lessee would pay an advance royalty. *Cf. Humphreys, supra* note 22, at 5-3, 5-4 (discussing some of the lease terms). This allowed a lessee to hold a lease for the entire 20 year period without production, as long as it paid the minimum royalty amount.

32. *See Federal Coal Leasing Policies, supra* note 22, at 98, 101.

33. 40 Fed. Reg. 60,070 (Dec. 31, 1975). *See also* 41 Fed. Reg. 21,779 (May 28, 1976).

34. 41 Fed. Reg. 60,070 (Dec. 31, 1975). Each lease would be considered an LMU, unless otherwise directed. *Id.* The forty-year period served as the basis for computing the advance royalty payment and was not a requirement for exhausting the reserves within forty

Initially, the Department proposed that each LMU (and thus each lease) had to achieve diligent development, which meant development of one-fortieth of the reserves within ten years of the later of either the regulations or the lease issuance.³⁵ Upon achieving diligent development, a lessee would then have to satisfy the requirement for "continuous operation," which was defined as production of 1% or more of the reserves each calendar year after achieving diligent development.³⁶ Moreover, the Department opted to specify that the failure to meet diligent development or continuous operation subjected the lease to cancellation, and in making his/her decision, the Secretary would not consider economic market conditions or "foreseeable costs of compliance with requirements for environmental protection."³⁷ In response to comments on its proposed rulemaking, the Department chose to compute "continuous operation" over a three-year running average,³⁸ and for special cases it agreed to allow a possible five-year extension of the diligent development requirement.³⁹

The Carter Administration's energy policy reflected, and doubtlessly influenced, these ongoing federal agency efforts designed to pro-

years. 41 Fed. Reg. 21,780 (May 28, 1976).

35. 41 Fed. Reg. 60,070 (Dec. 31, 1975). The proposed regulations included a caveat for extraordinary circumstances, although market factors or environmental compliance were expressly excluded from the exception. *Id.* at 60,071. *Cf.* AMCA Coal Leasing, Inc. (*On Reconsideration*), 114 IBLA 246 (1990) (discussing pre-FCLAA 1982 regulations on LMU's effective date).

36. 40 Fed. Reg. 60,071 (Dec. 31, 1975).

37. *Id.* Environmental compliance costs apparently were treated similar to other business costs. *Id.*

38. 41 Fed. Reg. 21,780-81 (May 28, 1976).

39. *Id.* at 21,779. The extension applied if the lessee could show that it was necessary for the development of advanced technology, or because of the size of the mining operation, or when a contractual arrangement existed that would result in the development of one-fortieth of the coal by the end of the extension period. *Id.*

note increased federal coal production.⁴⁰ Professor Dan Tarlock aptly described the situation as follows:

Western coal was a target for rapid exploitation. These reserves had already become attractive to utilities in the late 1960s after newly imposed air pollution requirements created incentives to trade low energy efficiency for environmentally superior coal of low sulfur content. Western coal was further attractive because mining costs were lower. Thick seams near the surface can be easily strip mined. The industry is not labor intensive, and sixty percent of the resources are owned by the federal government and open to easy leasing. In the 1970s, it seemed as if the federal government was in a unique position to use its energy resources to respond quickly to the perceived end of the petroleum era by using large amounts of federal coal as a bridge to a new era of reliance on non-renewable resources.⁴¹

President Carter's National Energy Plan (NEP), formally published in 1977, envisioned greater use of coal, whether as a transition fuel or for potential gasification,⁴² proposing increased coal production by two-thirds, to over one billion tons per year.⁴³ The NEP observed that "conserving scarce oil and natural gas is far more important than saving coal."⁴⁴ This emphasis on coal production was tempered by the recognition that the Administration would, "[w]hile promoting greater use of coal . . . seek to achieve continued improvement in environmental quality."⁴⁵

40. Prior to the passage of FCLAA, Congress had adopted general programs encouraging coal production. In 1970, Congress passed the Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631, 84 Stat. 1876, which act expressed Congress' policy of encouraging private mineral development, in an environmentally sensitive manner. Congress also sought to encourage utilities to switch from natural gas or oil to coal. Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, 88 Stat. 246; Powerplant and Industrial Fuel Use Act, Pub. L. No. 95-619, 92 Stat. 3206 (1978), *repealed by* Pub. L. No. 100-42, 101 Stat. 310 (1987). *See also* Horwitch, *supra* note 10, at 84. This emphasis on coal production apparently was not balanced by any effective environmental constraints, at least not until Congress passed SMCRA and the 1977 amendments to the Clean Air Act. One observer suggests that, prior to the mid-1970's at least, "[c]ontrol over electric utilities was especially lax because the midwestern coal interests had sufficient influence in Congress to prevent the imposition of stringent controls." ARNOLD W. REITZE, JR., AIR POLLUTION LAW 33-34 (1995).

41. Tarlock, *supra* note 10, at 351.

42. NEP, *supra* note 10, at XII, XIX.

43. *Id.* at XIII.

44. *Id.*

45. *Id.* at XIX. The NEP acknowledged the environmental issues associated with increased coal production and proposed to study the effect of increased coal utilization, including expanding research and development. *Id.* at 100. The Administration's environmental coal

IV. CONGRESS ENTERS THE FRAY: FCLAA

Before the formal release of the NEP, and only months after the Interior Department promulgated its final diligence regulations, Congress passed FCLAA, over President Ford's veto. Through FCLAA, Congress sought to ensure a fair return to the treasury for the leasing of federal coal reserves, as well as to provide a mechanism for leasing tracts of coal reserves that would be consistent with land use planning, environmental concerns and the need for additional coal.⁴⁶ Such a planned approach to the leasing of coal reserves was accompanied by Congress' policy choice of requiring timely development of those reserves and discouraging — if not effectively ending — the speculative holding of federal coal leases. Many of the provisions of FCLAA codified, with some changes, the Department's proposed EMARS II leasing program under the MLA.⁴⁷ The new diligence requirements under FCLAA, for instance, were patterned after the Department's recently promulgated pre-FCLAA rules.⁴⁸ In particular, three provisions in FCLAA were designed to end the apparent widespread speculation and abuses identified in the federal coal program.

A. *Leasing*

First, Congress ended the prospecting permit and preference right leasing system, subject to valid existing rights. In lieu of this old program, Congress authorized the Secretary of the Interior to divide lands into coal leasing tracts and award leases by competitive bidding at fair market value (a similar process had been allowed under the MLA).⁴⁹

policy included several specific elements: (1) requiring the installation of best available control technologies for new plants; (2) protecting areas with clean air from significant deterioration; (3) encouraging timely state actions to address air quality concerns; (4) studying offsetting pollution trade-offs for new installations; (5) studying the health effects of increased coal mining and use, including studying the long-term effects of CO₂ and other hydrocarbons on the atmosphere; (6) supporting an uniform strip mining law; and (7) expanding the federal government's research and development program. *Id.* at XX. *See also id.* at 63-69.

46. *See generally* H.R. REP. NO. 681, 94th Cong., 1st Sess. 8-12, 14-21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1943, 1950.

47. *See generally* *Federal Coal Leasing Policies*, *supra* note 23, at 9-10; Solicitor's Opinion M-36951, *supra* note 20.

48. *See id.*; Krulitz, *supra* note 22, at 158.

49. Pub. L. No. 94-377, 90 Stat. 1083 (1976) (codified at 30 U.S.C. § 201(a) (1994)).

Congress further directed that “[n]o lease sale shall be held unless the lands containing the coal deposits have been included in a comprehensive land-use plan and such sale is compatible with such plan.”⁵⁰ The process for deciding what lands to lease was similar in concept to the Department’s proposed EMARS II leasing program.⁵¹ Leases subject

The leasing process is governed by the Part 3400 Coal Management Regulations, 43 C.F.R. Subparts 3400-3427 (1995), which are now being reviewed in their entirety. 59 Fed. Reg. 36,108, 36,110 (1994). For regulations governing those preference right lease applications based upon prospecting permits issued prior to FCLAA, see 43 C.F.R. Subparts 3430-32, 3445-46 (1995). *See also supra* note 25. Generally, leasing can occur either upon application or in accordance with the leasing procedures for coal production regions. *E.g.*, 43 C.F.R. Subpart 3425 (1995) (leasing by application). Under the regional leasing program, the Secretary establishes regional leasing levels, based, in part, upon any environmental, social and economic effects, any industry expressed interest, the projected future demand for coal and a consideration of any national energy needs. 43 C.F.R. § 3420.2 (1995). Once regional levels are set, tracts are then identified for leasing through the activity planning process, which results in the preparation of a regional lease sale EIS that identifies the lease tract ranking and selections. 43 C.F.R. § 3420.3 (1995). Coal lands identified in the land use planning process are reviewed by regional coal teams, during this activity planning process. 43 C.F.R. §§ 3420.1-8, 3420.2, 3420.3-1 (1995). For recent regional coal team activities in two well-known areas, see, *e.g.*, 60 Fed. Reg. 24,647 (1995) (Unita-Southwestern Utah area); 60 Fed. Reg. 62107 (1995) (Powder River area in Wyoming). After consultation with the various affected interests (43 C.F.R. § 3420.4 (1995)), the Secretary may then offer the selected tracts for lease sale through a competitive bidding process. 43 C.F.R. § 3420.5, & Part 3422 (1995). Competitive bidding is not required in circumstances warranting emergency leasing. 43 C.F.R. § 3425.1-4 (1995). *See* David B. Pariser, *Current Issues Relating to Emergency Federal Coal Leasing*, 89 W. VA. L. REV. 593 (1987). The Act also authorizes the issuance of an exploration license that confers no lease rights under the Act. 90 Stat. 1085; *see also* 43 C.F.R. Subpart 3410 (1995).

50. Pub. L. No. 94-377, 90 Stat. 1084 (1976) (codified at 30 U.S.C. § 201(a)(3)(A)(i) (1994)). *See* 43 C.F.R. § 3420.1-4 (1994). Only a few months after Congress enacted FCLAA, it passed the Federal Land Policy and Management Act of 1976 [hereinafter FLPMA], Pub. L. No. 94-579, 90 Stat. 2744 (1976), which included a requirement for the development of new land use plans. 43 U.S.C. § 1712 (1988). FCLAA land use plans were to include an assessment of the amount of coal deposits, identifying those deposits recoverable from surface or underground mining. Pub. L. No. 94-377, 90 Stat. 1085 (1976) (codified at 30 U.S.C. § 201(a)(3)(B) (1994)). Congress further envisioned an exploratory program that would provide an assessment of the amount of lands containing recoverable coal reserves available for leasing. Pub. L. No. 94-377, 90 Stat. 1088 (1976) (codified at 30 U.S.C. § 208-1 (1994)). FCLAA also directed the Secretary to consider environmental impacts prior to leasing. *Id.* at 1085 (codified at 30 U.S.C. § 201(a)(3)(C) (1994)). FCLAA, however, does contain an exception to this general requirement. 30 U.S.C. § 201(a)(3)(A)(ii) (1994). For a comparison with land use planning in the context of oil and gas leasing, see generally NATIONAL RESEARCH COUNCIL, LAND USE PLANNING AND OIL AND GAS LEASING ON ONSHORE FEDERAL LANDS (1989).

51. “Congress adopted many of the elements of the EMARS II program in the” FCLAA. Lawrence J. MacDonnell, *Mineral Law in the United States: A Study in Legal*

to FCLAA would require the payment of annual rentals, as well as a royalty rate of not less than 12 1/2% for surface mining operations and possibly a lesser amount for underground mining operations.⁵² The royalty rate for underground mines was not congressionally established, but has since been set by the Interior Department at 8%, unless after lease issuance the Secretary determines that conditions warrant a reduction.⁵³ In lieu of the old indefinite twenty-year leases under the MLA, FCLAA further required lease readjustment every ten years.⁵⁴

B. Requirements to Avoid Speculative Lease Holdings

Second, Congress strengthened the diligent development requirements that already existed in Section 7 of the original MLA. Section 3 of FCLAA banned the issuance of any new leases under the MLA, including oil and gas leases, to a lessee holding a non-producing federal coal lease for over ten years after the effective date of FCLAA.⁵⁵

Change, reprinted in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 66-93, 85 (Lawrence J. MacDonnell & Sarah F. Bates eds. (1993)). See also Martin, *supra* note 19, at 1038-45; Tarlock, *supra* note 19, at 336.

52. Pub. L. No. 94-377, 90 Stat. 1087 (1976) (codified at 30 U.S.C. § 207(a) (1994)). The federal royalty may be reduced, when it is done for the purpose of encouraging the greatest ultimate recovery of federal coal, and in the interest of conservation of federal coal and other resources, upon the determination that such reduction is necessary to promote development or where the lease can not be successfully operated under its terms. 43 C.F.R. § 3485.2(c)(1) (1995). Cf. Solicitor's Opinion M-36920, *Reduction of Production Royalties Below Statutory Minimum Rates*, 87 I.D. 69 (1979). See also GENERAL ACCOUNTING OFFICE, NEED FOR GUIDANCE AND CONTROLS ON ROYALTY RATE REDUCTIONS FOR FEDERAL COAL LEASES (GAO/EMD-32-86 1982); David B. Pariser, *Federal Coal Royalty Reduction and Product Valuation*, 90 W. VA. L. REV. 805 (1988). For a general discussion on leasing in the preamble to the 1982 regulations, see 47 Fed. Reg. 33,115-33,128 (1982).

53. 43 C.F.R. § 3473.3-2(a)(2) (1995); 44 Fed. Reg. 33,132 (1982).

54. 30 U.S.C. § 207(a) (1995); 43 C.F.R. § 3451.1 (1995).

55. Section 3 of FCLAA amended Section 2(a) of the MLA to proscribe, in part, the issuance of a lease "where any such entity holds a lease or leases issued by the United States to coal deposits and has held such lease or leases for a period of ten years when such entity is not, except as provided for in Section 7(b) of this Act, producing coal from the lease deposits in commercial quantities." Pub. L. No. 94-377, 90 Stat. 1083, 1083-84 (codified at 30 U.S.C. § 201(a)(2)(A) (1994)). See H.R. REP. NO. 681, 94th Cong., 1st Sess. 15 (1975), reprinted in 1976 U.S.C.C.A.N. 1951 (lessees would be prohibited from acquiring new federal leases if they held non-producing federal coal lease for 15 — later changed to 10 — years after enactment). See also 122 Cong. Rec. 135 (1976) (remarks of Cong. Patsy Mink). Initially, it was unclear whether the Section 3 ban on the issuance of new leases applied to non-coal leases as well. See 47 Fed. Reg. 33,131 (1982) (1982 final rulemaking for Section 3 only relates to coal leases and "implies nothing about section 3's

Industry opposed this provision and unsuccessfully tried to have it repealed in the early 1980s.⁵⁶ The ten year requirement, however, simply prompted lessees fearful of the consequences to sell — or apparently relinquish — their leases,⁵⁷ a possibility made all the more attractive when Congress in 1985 gave lessees an additional four months to take such action.⁵⁸ Of course, today this provision is effectively superfluous, because the ten year diligent development requirement in FCLAA, discussed below, should prevent a lessee from ever triggering the Section 3 ban.⁵⁹

applicability to other minerals”). The Interior Department Solicitor settled this issue in 1985, by holding that it did. Solicitor’s Opinion M-36951, *supra* note 20, at 539. This view prevailed in *Conoco, Inc. v. Hodel*, 626 F. Supp. 287 (D. Del. 1986). The Solicitor also concluded that the Department acted legally in interpreting the Section 3 language “producing . . . in commercial quantities.” Solicitor’s Opinion M-36951, *supra* note 20. *See also* 51 Fed. Reg. 37,202, 37,203 (1986) (proposed rule under Section 2(a)(2)(A) and discussing BLM’s guidelines); 51 Fed. Reg. 43,910 (1986) (final rule).

56. *See* Bagge, *supra* note 25, at 721. The Department of the Interior supported a repeal. *See* DEP’T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1984 at 46 (explaining Interior’s position). Indeed, the Department originally had not endorsed this provision. H.R. REP. NO. 681, 94th Cong., 1st Sess. 38 (1975).

57. A 1981 report prepared by the Office of Technology and Assessment (OTA) suggested that the majority of the existing pre-FCLAA leases would not likely meet the Section 3 ten year production requirement. OTA REPORT, *An Assessment of Development and Production Potential of Federal Coal Leases*, at 21, 238 (1981). In 1986, OTA’s analysis of Section 3 stated that approximately half of the then existing western pre-FCLAA leases were unlikely to satisfy the Section 3 deadline. OTA SPECIAL REPORT, *Potential Effects of Section 3 of the Federal Coal Leasing Amendments Act of 1976*, at 3 (1986). The result, as the GAO has observed, is that “a lessee wishing to qualify for new leases may sell or relinquish the leases that are causing disqualification.” GENERAL ACCOUNTING OFFICE, MINERAL RESOURCES: FEDERAL COAL-LEASING PROGRAM NEEDS STRENGTHENING 27 (GAO/RCED-94-10 Sept. 1994) [hereinafter MINERAL RESOURCES]. When a disqualification appeared on the horizon, perhaps the only hindrance to such a transfer was whether the Department would authorize the assignment and how the Department would treat apparent assignees not controlled by or affiliated with the assignor. *See* 47 Fed. Reg. 33,131 (1982). BLM’s oversight of assignments appears limited, except in instances where an overriding royalty may adversely affect production. *See* 43 C.F.R. § 3473.3-2(d) (1995); Gifford H. Allen et al., 131 IBLA 195 (1994); Robert H. Gleason, 129 IBLA 378 (1994). But BLM could not approve an assignment when the assignee was not qualified because of Section 2(a)(2)(A), even where the assignment was filed — and just not approved — prior to December 31, 1986. Veola and Aaron Rasmussen, 109 IBLA 106 (1989). *See generally* Solicitor’s Opinion M-36951, *supra* note 22, at 555-57, 563 n.84, n. 91 (discussing assignments).

58. Although August 4, 1976 was the effective date of FCLAA, Congress in 1985 extended the deadline from August 4, 1986 to December 31, 1986. Pub. L. No. 99-190, § 101(d) (1985).

59. *See* Solicitor’s Opinion M-36951, *supra* note 20, at 549.

Before a lessee whose lease is subject to FCLAA can begin operations and production, it must comply with the requirements of both SMCRA and FCLAA.⁶⁰ FCLAA compliance includes those requirements designed to ensure against speculative holdings and provide for the maximum economic recovery (MER) of federal coal. In order to ensure MER, Section 3 of FCLAA also provides that "no mining operating plan shall be approved which is not found to achieve the maximum economic recovery of coal within the tract."⁶¹ The implementing regulations follow this command by specifically requiring that lessees develop their leases in a manner that will achieve MER.⁶² Mining operations must comply with these requirements⁶³ as well as an approved resource recovery and protection plan and any other appropriate agency orders.⁶⁴ Also, operators are to prevent the wasting

60. Cf. *Atlantic Richfield Co., West Elk Coal Co.*, 112 IBLA 115 (1989) (distinguishing between compliance with SMCRA and compliance with FCLAA). Wholly independent of FCLAA, for example, SMCRA might require applicants for a SMCRA permit to provide a description of the anticipated annual and total production of coal over the life of the mine within the proposed permit area. 30 C.F.R. § 784.11 (1994). The applicant also might have to describe in its application the estimated life of the operations, as well as the size, sequence and timing of anticipated subareas for which individual permits for mining will be sought. 30 C.F.R. §§ 783.12(a), 783.24(c), 784.23(a) (1994). As one commentator notes, SMCRA requires the preparation of both an operational and reclamation plan, with "[d]elays in procuring permit approval are the mine planner's nightmare. . . . Adequate preparation can mean several years of baseline studies and data compilation to evaluate hydrology, air quality, fish and wildlife, vegetation, soils, geology, archaeological resources and land use." Harold P. Quinn, Jr., *Coal Resource Development and Land Use Planning: The Demands of SMCRA*, 3 NAT. RESOURCES & ENV'T. 24, 27 (1989).

61. Pub. L. No. 94-377, 90 Stat. 1085 (1976) (codified at 30 U.S.C. § 201(a)(3)(C) (1994)). See also H.R. REP. NO. 681, 94th Cong., 1st Sess. 20 (1975), reprinted in 1976 U.S.C.C.A.N. 1956.

62. 43 C.F.R. § 3482.2(a)(2) (1995). The regulation defines MER, as requiring that: based on standard industry operating practices, all profitable portions of a leased Federal coal deposit must be mined. At the times of MER determinations, consideration will be given to: existing proven technology; commercially available and economically feasible equipment; coal quality, quantity, and marketability; safety, exploration, operating, processing, and transportation costs; and compliance with applicable laws and regulations. The requirement of MER does not restrict the authority of the authorized officer to ensure the conservation of the recoverable coal reserves and other resources and to prevent the wasting of coal.

43 C.F.R. § 3480.0-5(a)(21) (1995). See also 47 Fed. Reg. 33,167-68 (1982) (discussing MER). The MER determination may be adjusted as additional information is gathered during development. *Id.* at 33,166. For a discussion of MER prior to the 1982 regulations, see Tarlock, *supra* note 10, at 353-54.

63. See 43 C.F.R. §§ 3483.1, 3484.1 (1995).

64. 43 C.F.R. § 3481.1(b) (1995).

of coal and other resources and “shall adequately protect the recoverable coal reserves and other resources upon abandonment.”⁶⁵ An approved plan, moreover, is a pre-condition to commencing any operations or development.

FCLAA creates an absolute three year deadline for submitting a resource recovery and protection plan (often called a 3-year “R2P2”).⁶⁶ This mandate prompts federal lessees to prepare plans for developing the coal resources shortly after lease issuance or readjustment.⁶⁷ An R2P2 must satisfy FCLAA’s requirements, including a description of the proposed mining operation, an estimate of the coal reserve base, minable reserve base, and recoverable reserves for each federal lease included in the R2P2, LMU boundaries, if applicable, as well as a general layout of the proposed mine and the planned sequence of mining for the life of the mine.⁶⁸ This plan also must explain how the lessee expects to satisfy the diligence requirements and

65. 43 C.F.R. § 3481.1(c) (1995). *See also* 43 C.F.R. §§ 3484.1(b), (c), 3484.2 (1995).

66. 30 U.S.C. § 207(c) (1994). The R2P2 is defined as “a plan showing that the proposed operation meets the requirements of the MLA for development, production, resource recovery and protection, diligent development, continued operation, MER, and the rules of this part for the life-of-the mine.” 43 C.F.R. § 3480.0-5(34) (1995). In its regulations, the Interior Department had authorized the granting of an extension of this 3-year filing requirement. 43 C.F.R. § 3483.3(a) (1995). In *NRDC v. Jamison*, 815 F. Supp. 454, 470-71 (D.D.C. 1992), however, the court held that FCLAA did not authorize granting such extensions. In response, the Department has proposed removing this provision. 59 Fed. Reg. 66874 (1994).

67. The regulations contemplate that lessees may satisfy this 3-year R2P2 submittal requirement and then have an additional period for compliance with other requirements, such as those under SMCRA. 47 Fed. Reg. 33,157, 33,165-66 (1982). The 3-year R2P2, therefore, need not be a detailed mine plan, but instead need only address the FCLAA requirements. *See* 47 Fed. Reg. 33,161 (July 30, 1982). According to the regulations, this 3-year R2P2 can be submitted to the authorized officer solely to satisfy the FCLAA filing requirement. 43 C.F.R. § 3482.1(b) (1995). Yet, before mining can occur, there must be an R2P2 submitted either with or after the submission of a permit application package (PAP) to the regulatory authority in accordance with SMCRA. *Id.*; 43 C.F.R. § 3482.2(a)(2) (1995). When the PAP is submitted to the SMCRA regulatory authority, “any deviations from the original [R2P2] that are reflected in the [PAP] must be submitted to [BLM] in order to ensure that the [R2P2] and the [PAP] address the same proposed operation at the time of approval of commencement of mining operations.” 47 Fed. Reg. 33,165 (1982); *see also* 47 Fed. Reg. at 33,167. The regulations provide that this R2P2 is submitted to the Assistant Secretary for decision. 43 C.F.R. § 3480.0-6(d)(2) (1995).

68. *See* 43 C.F.R. § 3482.1 (1995).

achieve MER for the leases included in the R2P2.⁶⁹ A plan can be approved only if it conforms with the regulations and is found to achieve MER of the federal coal.⁷⁰

As we have seen, FCLAA also adopted the Interior Department's concept of requiring diligent development.⁷¹ Section 6 of FCLAA amended Section 7 of the MLA by expressly directing that lessees who have leases not producing coal in commercial quantities at the end of ten years are to have those leases terminated.⁷² The regulations define "diligent development" to mean "the production of recoverable coal reserves in commercial quantities prior to the end of the diligent development period."⁷³ And, after meandering through further definitions,⁷⁴

69. 43 C.F.R. § 3482.1 (1995).

70. 43 C.F.R. § 3482.1(a)(2) (1995). The regulations allow a lessee or operator to propose modifications to a R2P2. 43 C.F.R. § 3482.2(c) (1995). *See also* 47 Fed. Reg. 33,169-70 (1982) (discussing changes to an approved R2P2).

71. *See* 43 C.F.R. § 3483.1 (1995).

72. Congress originally considered requiring lessees to achieve diligent development within 15 years, H.R. REP. NO. 681, 94th Cong., 1st Sess. 15, 21 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1951, 1957, but the period was later changed to 10 years. 122 CONG. REC. 148-49, 504 (1976). *See generally* Solicitor's Opinion M-36951, *supra* note 20, at 547-49. Congress also proposed in the Department of Energy Organization Act of 1977, to transfer the authority for developing diligence rules to the Department of Energy. *See* 46 Fed. Reg. 62,226 (1981) (Department of Energy proposed diligence regulations); 91 Stat. 579. On December 23, 1981, this authority reverted back to Interior pursuant to Pub. L. No. 97-100. Within Interior, the BLM obtained jurisdiction over the program pursuant to Order No. 3087, issued by the Secretary of the Interior on December 3, 1982. 48 Fed. Reg. 41,589 (1983); 47 Fed. Reg. 33,154, 819 (1982).

73. 43 C.F.R. § 3480.0-5(a)(12) (1995). *See* 47 Fed. Reg. 33,157 (1982) (discussing diligent development).

74. "Recoverable coal reserves" is defined as the "minable reserve base," after certain exclusions (e.g., property barriers, pillars, fenders). 43 C.F.R. § 3480.0-5(a)(32) (1995). The amount of "recoverable coal reserves" is estimated by the authorized officer as of the date of approval of a R2P2 or the date of approval of a mine plan under the SMCRA regulations. 43 C.F.R. § 3482.2(a)(3) (1995). This estimate may be changed only if new information becomes available. *Id.*; *see also* Ark Land Co., 132 IBLA 235, 241 (1995) (determination of recoverable coal reserves is a dynamic process). "Minaable reserve base," in turn, includes that portion of the "coal reserve base" that is commercially minable, including coal left in the ground for pillars, fenders, property barriers, or the like, but excluding areas where mining is prohibited, such as areas classified as unsuitable for coal mining. 43 C.F.R. § 3480.0-5(a)(23) (1995). The definition of "coal reserve base" is somewhat more elaborate, with a means for estimating the amount of tons in place in each coal bed. 43 C.F.R. § 3480.0-5(a)(5) (1995). The genesis of this definition is General Mining Order No. 1, issued in 1979. *See* Atlantic Richfield Co., West Elk Coal Co., 112 IBLA 115, 118 n.5 (1989). *See generally* 47 Fed. Reg. 33156 (1982) (discussing coal reserve base, minable reserve base and recoverable coal reserves).

this means that lessees must develop 1% of the commercially minable coal in a lease or a LMU, less pillars, fenders, property barriers and the like, within ten years of lease issuance, readjustment or the effective date of an LMU.⁷⁵ Failure to satisfy diligent development results in lease or LMU termination.⁷⁶ Once lessees achieve diligent development, they must still comply with the requirement for “continued operation”⁷⁷ or, when permitted, pay an “advance royalty.”⁷⁸ In order to address a prior loophole, Congress limited the number of years a lessee can pay advance royalty.⁷⁹

C. Logical Mining Units

Finally, FCLAA confirmed the Department’s pre-existing acceptance of the concept of an LMU, with certain changes.⁸⁰ Section 5 of

75. 43 C.F.R. § 3480.0-5(a)(13) (1995) (defining “diligent development period”); *id.* at § 3480.0-5(a)(6) (defining “Commercial quantities”). *See also* 43 C.F.R. § 3483.5 (1995) (crediting of production toward diligent development).

76. 43 C.F.R. § 3483.2(a) (1995). The diligence period, however, can be suspended under Section 39 of the MLA. *See infra* notes 98-128 and accompanying text.

77. 43 C.F.R. § 3480.0-5(a)(8) (1995). “Continued operation” is the production of at least “commercial quantities” of recoverable coal reserves in the first two “continued operation” years after achieving diligent development and then such production over a three year running average thereafter. *Id.* “Continued operation year” is defined as “the 12-month period beginning with the commencement of the first royalty reporting period following the date that diligent development is achieved and each 12-month period thereafter”, unless suspended. 43 C.F.R. § 3480.0-5(a)(9) (1995). *E.g.*, Coastal States Energy Co., 110 IBLA 179 (1989) (applying continued operation requirement).

78. 30 U.S.C. § 207(b) (1994); 43 C.F.R. § 3480.0-5(a)(1) (1995) (defining “advance royalty”); 43 C.F.R. § 3483.4 (1995) (terms for payment of advance royalty). *See, e.g.*, Western Slope Carbon, Inc., 98 IBLA 198 (1987). *Cf.* 43 C.F.R. § 3483.2(c) (1995) (“[a]ny Federal coal lease on which continued operation is not maintained shall be subject to cancellation”). The BLM has indicated that “until an operation has produced 1 percent of the recoverable coal reserves, advance royalty cannot be accepted.” 47 Fed. Reg. 33156 (1982). *See* Cyprus Western Co. (on judicial remand), 133 IBLA 52 (1995) (advance royalty due only after lessee achieves diligent development). Unlike rental payments or other royalties, the regulations do not provide for the waiver, suspension or reduction of advance royalty payments. 43 C.F.R. § 3483.2(c)(1) (1995). The requirement for continued operation or the payment of advance royalties might be suspended during the period of a *force majeure* event. 30 U.S.C. § 207(b) (1994); 43 C.F.R. § 3483.3 (1995); Solicitor’s Opinion M-36951, *supra* note 21, at 551. *See generally* Ark Land Co., 132 IBLA 235 (1995).

79. *See* Solicitor’s Opinion M-36951, *supra* note 20, at 551-52. *See generally supra* note 20 and accompanying text.

80. *See supra* notes 35-40 and accompanying text. *See also* Federal Coal Leasing Policies, *supra* note 22, at 113 (Senator Lee Metcalf’s floor statement regarding LMU’s).

FCLAA authorized the Secretary to approve the consolidation of federal and adjacent non-federal coal leases into an LMU, upon a determination that such consolidation would serve the maximum economic recovery of a single or multiple coal deposit.⁸¹ The BLM recently explained the benefits of an LMU:

A logical mining unit may consist of one or more Federal leaseholds, and may include intervening or adjacent lands in which the United States does not own the coal resources, but all the lands in a logical mining unit must be under the effective control of a single operator, be able to be developed and operated as a single operation and be contiguous.

An LMU is a production allocation mechanism, which allows a straightforward approach to the logical sequencing of mining operations on contiguous lands. The purpose of an LMU is to permit coal to be mined in a sequence that makes sense. In the western United States, where checkerboard land-ownership patterns are common, an operator may develop several contiguous coal leases on lands that are owned by different entities that were leased at different times. In some cases, requiring the operator to mine the oldest Federal leases first in order to meet diligent development requirements would be inefficient and would not ensure maximum economic recovery of coal reserves. Similarly, requiring an operator to maintain production on multiple contiguous leases in order to meet lessee-qualification requirements under Section 2(a)(2)(A) or continued operation requirements under Section 7 of MLA would be inefficient.

An LMU consolidates two or more Federal leases (or Federal and non-Federal tracts) and allows the Secretary to credit production from anywhere in the LMU to all Federal leases contained in the LMU, for purposes of diligent development, continued operation and lessee qualification. Thus, formation of an LMU can permit more efficient mine sequencing, allowing an operator to progress logically from one lease to the next, while also allowing the lessee to meet applicable production requirements.⁸²

The procedure for obtaining the designation of an LMU is established in the BLM regulations, which provide that the BLM may direct the formation of an LMU or may approve an operator/lessee's request for an LMU.⁸³ An LMU cannot exceed 25,000 acres,⁸⁴ and it must be

81. Pub. L. No. 94-377, 90 Stat. 1086 (1976) (codified at 30 U.S.C. § 202a(1) (1994)).

82. 59 Fed. Reg. 66874 (1994).

83. 43 C.F.R. § 3487.1 (1995). An LMU can be approved if all the federal leases within the LMU are made subject to the FCLAA requirements, such as the submittal of an R2P2, diligent development, continued operation, MER and payment of advance royalty. *Id.*; 30 U.S.C. § 202a(2), (3) (1994). Pre-FCLAA leases within an LMU are made subject to

“mined within a period established by the Secretary which shall not be more than forty years.”⁸⁵ BLM had approved 39 LMU’s as of December 1994, which when totaled comprise 155 of the remaining 431 leases (as of Fiscal Year ‘93), 32% of the federal lease acres and 51% of federal coal production.⁸⁶

The formation of an LMU can serve as one way of mitigating or possibly avoiding the diligence requirements. When Congress enacted FCLAA, it understood that LMUs might be used to circumvent the diligence requirements. Chairwoman Patsy Mink, of the House Subcommittee on Mining, observed that LMUs can provide an “enormous exemption to the requirements of due diligence and continuous operation by permitting old leases to be consolidated and treated as one”⁸⁷ According to a recent report by the General Accounting Office (GAO), Chairwoman Mink’s comments might be prophetic.

In September of 1994, the GAO issued a report, “Mineral Resources: Federal Coal-Leasing Program Needs Strengthening,”⁸⁸ addressing, in part, the Bureau of Land Management’s efforts to “encour-

Section 2(d) of FCLAA. 30 U.S.C. § 202a(5) (1994). For new proposed LMU rules, see *infra* note 95 and accompanying text.

84. 30 U.S.C. § 202a(7) (1994). This acreage limitation apparently reflected an extrapolation of the amount of coal necessary to satisfy a large power plant’s production needs over a forty year period. See *Federal Coal Leasing Policies*, *supra* note 22, at 113 (statement of Senator Lee Metcalf).

85. 30 U.S.C. § 202a(2) (1994). The 40 year mine-out period paralleled the Department’s prior effort at simply encouraging a 40 year development scenario. Senator Lee Metcalf, the chairman of the subcommittee overseeing mineral activities, expressed concern that the Interior Department’s draft diligence regulations might allow a lease within an LMU to be held for over a hundred years, merely by satisfying the “continued operation” amount. *Federal Coal Leasing Policies*, *supra* note 22, at 104-05. Although Congress expressly addressed this issue, the Department could have ensured a 40 year mine-out period by requiring compliance with a mine plan that included development in excess of the “continued operation” amount, with the only apparent difference being the Department’s flexibility for responding to a violation of a mine plan versus a failure to satisfy “continued operation.” See 41 Fed. Reg. 56,644 (Dec. 29, 1976).

86. 59 Fed. Reg. 66,875 (1994).

87. 122 Cong. Rec. 507 (1976) (remarks of Cong. Patsy Mink). Often, a critical issue in the establishment of an LMU is its effective date — that is, the date that starts the diligence clock. See, e.g., AMCA Coal Leasing, Inc., 114 IBLA 246 (1990) (*on reconsideration*). See generally MINERAL RESOURCES, *supra* note 57, at 67-68 (letter from Associate Solicitor, Division of Energy and Resources, Department of the Interior, discussing, in part, an LMU’s effective date).

88. MINERAL RESOURCES, *supra* note 57.

age the development of federal coal leases” and “consider projected demand in coal-leasing decisions.”⁸⁹ Initially, the report focused on whether the BLM disregarded Section 3 of FCLAA when it issued new MLA leases to Kerr-McGee Coal Corporation (Kerr-McGee), concluding that “BLM issued federal mineral leases to a lessee who does not meet FCLAA’s qualification requirements.”⁹⁰

After March 1988, the BLM issued several oil and gas leases and one coal lease to Kerr-McGee, even though Kerr-McGee had “held two pre-FCLAA coal leases in an LMU from which no coal had been produced since February 1988”⁹¹ The GAO opined that the company was not qualified to acquire any new leases, “because it has not produced coal in commercial quantities from the LMU since the LMU was formed and has not produced any coal at all from the LMU since 1988.”⁹² Similarly, the GAO questioned the BLM’s approval of a lease sale and formation of an LMU to Northwestern, where both the sale and LMU allowed Northwestern to avoid what GAO believed as

89. Letter from Keith O. Fultz, Assistant Comptroller General to Hon. Richard Lehman, Chairman, Subcommittee on Energy and Mineral Resources, Committee on Natural Resources, House of Representatives, Sept. 16, 1994, *reprinted in* MINERAL RESOURCES, *supra* note 57. The GAO specifically examined “actions taken by (1) BLM to encourage the development of federal coal leases, (2) BLM and the Forest Service to address cumulative environmental impacts of additional coal leasing, and (3) BLM to consider projected demand in coal-leasing decisions.” *Id.* at 20.

Issues two and three appear to have been prompted by the Department’s focus on leasing-by-application rather than by having certain areas identified for leasing through the regional coal sales process. The regional process necessarily would include an assessment of demand, as well as a regional environmental document that by its nature would address cumulative environmental impacts. “On March 17, 1994, in response to a draft of this report, BLM issued an instruction memorandum to its field offices directing that each environmental document either directly address cumulative impacts or incorporate, by reference, other environmental documents that address cumulative impacts.” *Id.*

90. MINERAL RESOURCES, *supra* note 57, at 4.

91. *Id.* at 23. According to the GAO, these two coal leases had not produced any coal as of September 26, 1986, a few months prior to the December 30, 1986 date; however, they were placed in an LMU with a producing state lease, such that production from the associated state lease would be attributable to the two federal leases. Mining operations in the LMU were then suspended the following year. *Id.* at 24.

92. *Id.* at 25. As of 1988, the company had not produced coal from the LMU in commercial quantities, although the terms of its “stipulations of approval” only required production in commercial quantities from the effective date of the LMU — or September 26, 1986.

imminent termination of a non-producing federal coal lease containing an estimated 55 million tons of recoverable coal.⁹³

The Department responded by explaining why the BLM's activities were authorized under FCLAA, although noting that perhaps, as a policy matter, the GAO's concerns were legitimate and that the Department was undertaking a review of its LMU regulations.⁹⁴ On December 28, 1994, the Department of the Interior proposed new LMU rules, with the purpose, in part, of amending "the regulations . . . to ensure that, consistent with the goals of [FCLAA] and the [MLA], LMU's are approved only for the purpose of developing federal coal resources in an 'efficient, economical and orderly manner,' and not solely for the purpose of extending diligent development periods."⁹⁵

D. Section 39 Suspensions of Operations/Production

Another way of potentially avoiding the harsh effects of the diligence requirement is for a lessee to obtain a suspension of the lease and regulatory requirements. A suspension can be granted either under Section 7(b) or Section 39 of the MLA. Section 7(b) of the MLA alleviates compliance with the continued operation requirement, in limited circumstances, "where operations under the lease are interrupted by strikes, the elements or casualties not attributable to the lessees."⁹⁶

93. *Id.* at 28.

94. MINERAL RESOURCES, *supra* note 57, at 61-71, 76-88, 92-107. The Department's Solicitor had previously recognized this possible problem with an LMU designation. Solicitor's Opinion M-36951, *supra* note 20, at 554-55. The BLM has noted that "in some circumstances, the existing regulations could be used as a device to circumvent FCLAA-mandated lease-specific production requirements." 59 Fed. Reg. 66,874, 66,875 (1994) (to be codified at 43 C.F.R. pts. 3400, 3470, and 3480) (proposed Dec. 28, 1994).

95. 59 Fed. Reg. 66,874. The proposed rule also would clarify the definition of "producing." *Id.* The current regulation defines "producing" to include "operating an ongoing mining operation in accordance with standard industry operation practices." 43 C.F.R. § 3400.0-5(rr)(6) (1995). The NOPR expresses concern that this definition might not serve FCLAA's policy goal of preventing speculative lease holdings. 59 Fed. Reg. 66,874, 66,876. "Finally, the proposed rule would remove the provision that allows extension of the 3-year deadline for submission of resource recovery and protection plans." *Id.* at 66,874.

96. 30 U.S.C. § 207(b) (1994). The IBLA has noted that the language of the *force majeure* exception only applies to "continued operation" and not to the requirement for "diligent development." See Mountain States Resources Corp., 111 IBLA 160, 163 n.5 (1989); see also Mountain States Resources Corp., 92 IBLA 184, 192 (1986); Solicitor's Opinion M-36958, *Suspensions of Operations & Production for Coal Leases Under Section 39 of the*

By contrast, Section 39 authorizes the granting of a suspension in many more instances. The Secretary may "assent" or "direct" a "suspension of operations and production under any lease granted under the terms of" the MLA, when it would be in the "interest of conservation."⁹⁷

The Secretary's authority to issue suspensions is dependent upon a determination that the action would be in the "interest of conservation." This phrase has been interpreted broadly "to include not only maximizing recovery and avoiding or minimizing waste or loss of the leased mineral resource but also avoiding or minimizing damage to other natural resources, such as wildlife, water quality, air quality, and other minerals."⁹⁸ The preamble to the final regulations, therefore, suggests that a suspension might be appropriate for the duration of the preparation of the environmental impact statement.⁹⁹ Additionally, the IBLA has suggested that a suspension of the lease term might be appropriate due to administrative actions addressing environmental concerns.¹⁰⁰

Mineral Leasing Act, 96 I.D. 15, 25 (1988) ("Congress felt compelled to state that none of the relief measures in section 7(b) . . . may be construed to delay commencement of production beyond the 10-year period . . .").

97. 30 U.S.C. § 209 (1994). Section 39 also authorizes the Secretary to "waive, suspend, or reduce the rental, or minimum royalty, or reduce the royalty on an entire [or portion of a] leasehold" when it is "necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms provided therein," and the Secretary's action is for the "purpose of encouraging the greatest ultimate recovery" and is in the "interest of conservation." *Id.*; see also *supra* note 52.

98. Solicitor's Opinion M-36958, *supra* note 96, at 18. See *Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595 (D.C. Cir. 1981) (protecting tundra/permafrost environment); *Getty Oil Co. v. Clark*, 614 F. Supp. 904 (D. Wyo. 1985), *aff'd* 840 F.2d 776 (10th Cir. 1988) (allowing Secretary to tailor suspension to environmental values of the leased premises).

99. 53 Fed. Reg. 49,984, 49,985 (1988) (to be codified at 43 C.F.R. pt. 3480).

100. Alfred G. Hoyl 123 IBLA 169, 191 (1992) (Hoyl I), *modified and aff'd*, 123 IBLA 194A (1993) (Hoyl II), *and later proceeding*, 127 IBLA 297 (1993); *Nevdak Oil & Exploration, Inc.*, 104 IBLA 133, 138 (1988) ("operations and production may be suspended . . . where suspension affords the Department sufficient time to decide whether and/or under what circumstances to permit exploration and development of the mineral resource so as to best protect other resources."); see also *Clark*, 614 F. Supp. at 920; *John March*, 98 IBLA 143, 147 (1987); *Jones-O'Brien*, 85 I.D. 89 (1978). In *Northern Cheyenne Tribe v. Hodel*, the court initially voided certain lease sales for failure to comply with the National Environmental Policy Act [hereinafter NEPA], and the Federal government and the lessees requested that the court amend its relief to suspend rather than rescind the leases, pending the outcome of NEPA compliance. CV 82-116-BLG-JFB (D. Mont. 1986), *rev'd and remanded*, 842 F.2d 224 (9th Cir. 1988), *motion granted sub nom. Tribe v. Lujan*, 804 F.

It also would appear that a Section 39 suspension may be granted, in the interest of conservation, where the lessee has not yet commenced operations or production. In the preamble to the final regulations, the BLM responded to a comment by noting that “the timing of the suspension of operations has no bearing on the manner in which a Federal coal lease is suspended.”¹⁰¹ The preamble further explained that suspensions generally will not be granted unless operations have commenced and production has occurred; but this general rule may not apply when a suspension is appropriate to avoid or minimize damage to other natural resources.¹⁰² The preamble invokes *Getty Oil Co. v. Clark*, and implicitly refers to the circumstances in *Consolidation Coal Co.*,¹⁰³ then pending before the Department.¹⁰⁴

In *Getty Oil Co.*, the Department granted a suspension prior to commencement of oil and gas operations. There, the lessee sought a suspension shortly before it was faced with a termination of its lease for failure to drill. In *Consolidation Coal Co.*, a federal coal lessee had not begun operations on its coal lease, and it sought to develop its lease together with an adjacent parcel of land on which the lessee had a preference right lease application (PLRA). Originally, the BLM had prepared an environmental assessment (EA) on the PRLA. That EA apparently took approximately two years to prepare and it did not contemplate joint development of the two contiguous leases. In lieu of following the ROD accompanying the EA, the lessee then amended its proposed mine plan to include both leases. The BLM determined that the decision on the PRLA required the preparation of an EIS, due to the significant increase in proposed coal production. The BLM granted a suspension effective on the date of the EIS announcement.¹⁰⁵

Supp. 1281 (D. Mont. 1991). The court agreed and directed the Secretary to act under Section 39. Any discussion about Section 39 suspensions typically presumes the applicability of suspension decisions for oil and gas lease leases, although the diligence requirements and concern for speculative holdings is not necessarily the same for oil/gas leases as it is for coal leases. *Id.*

101. 53 Fed. Reg. 49,984 (1988).

102. *Hoyl I*, 123 IBLA at 191 n.18 (referring to preamble). *But see Hoyl II*, 123 IBLA at 194C n.2.

103. 111 IBLA 381 (1989).

104. *See* 53 Fed. Reg. 49,985.

105. It is not clear whether the BLM ever made a finding that the suspension was in the “interest of conservation.” Instead, the BLM noted that, unless Consol obtained a PRL to the adjacent tract, Consol could not submit and obtain approval of a comprehensive mining

The IBLA has observed that the granting of a suspension might become a "matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded" ¹⁰⁶ For example, the IBLA has indicated that when the Government, on its own initiative and without any pending suspension application, affirmatively orders a restriction on operations and/or production, the lessee is entitled to an automatic extension of the lease terms and conditions during the period of any such suspension. ¹⁰⁷ In *Copper Valley Machine Works, Inc. v. Andrus*, ¹⁰⁸ for example, the court held that the Secretary directed a *de facto* suspension when it issued a drilling permit prohibiting drilling during the summer months.

In *Getty Oil Co.*, the question of the discretionary nature of a suspension arose in the context of a dispute over the scope of an EIS in the oil and gas program. There, the legal issue was whether the EIS on the company's application for a permit to drill (APD) required a "no action" alternative. The IBLA held that a "no action" alternative precluding drilling should have been considered, because the possibility of precluding development was preserved under the terms of a suspension granted to the company. ¹⁰⁹ Getty Oil argued that the suspension

plan under SMCRA. But this apparent omission is irrelevant, since the IBLA's decision did not involve a review of the suspension. Rather, shortly after BLM granted the suspension, BLM also issued a decision readjusting Consol's pre-FCLAA lease, with an effective date that was earlier than the initial 20 year lease period plus the suspension period. Consol objected to BLM's attempt to readjust the lease term, arguing that it was entitled to the initial 20 year lease period. The IBLA agreed. It held that the 20 year period prior to readjustment is tolled during the Section 39 suspension. 111 IBLA at 390.

106. *Nevdak Oil & Exploration, Inc.*, 104 IBLA at 137 (1988). In *Alfred G. Hoyl*, the IBLA opined that the *Getty* court suggested that a suspension is required "where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee's operator 'timely access' to the property, as it would be an abuse of discretion not to grant a suspension in such circumstances." *Hoyl II*, 123 IBLA at 194J n.9.

107. *Hoyl II*, 123 IBLA at 194H (dicta).

108. 653 F.2d 595 (D.C. Cir. 1981).

109. *Sierra Club*, 80 IBLA 251 (1984). Confronted with a quickly approaching expiration of the primary term on its leases, the unit operator filed a perfunctory APD, with the approval of the Department. "Perceiving that an extensive environmental review would be required prior to acting on the APD, GS then suspended the lease and all other leases due to expire in [that unit] at the behest of those lessees." *Id.* at 253. The EIS was combined with other APDs for other areas. The suspension for the unit included a provision for automatic termination if it was determined that such operations would result in unacceptable impacts on the wilderness characteristics of the area. The ensuing litigation addressed whether

was mandatory under *Copper Valley*, and thus, the Department could not “use the suspension instrument as a vehicle to qualify or diminish the right of full enjoyment to which the lessee was entitled under the lease terms.”¹¹⁰ The IBLA rejected this argument, holding that the suspension was discretionary and therefore could be conditioned.¹¹¹

The IBLA reasoned that the determination of whether a suspension is mandated must be made “on a case-by-case basis through the evidentiary attribution of fault for the delay.”¹¹² It rejected any reliance on *Copper Valley*, reasoning that *Copper Valley* did not involve an application for a suspension, but rather involved a suspension ordered by the Secretary; thus, the “fault” of the lessee there was irrelevant.¹¹³ The IBLA’s inquiry, therefore, focused on the factual circumstances surrounding the filing of the suspension application. These circumstances indicated that the suspension was discretionary. In particular, the IBLA noted that the application was filed late in the lease term and, regardless of environmental concerns, it would have been unlikely for the lessee to have been engaged in diligent drilling before the expiration of the lease.¹¹⁴ Additionally, “there were known environmental concerns which had to be addressed.” Consequently, the IBLA concluded that the lessee was not “entitled” to a suspension as a matter of “right,” noting that “the operator’s inability to commence drilling before the lease expired cannot be attributed to any order, action, omission, or delay by any Federal agency.”¹¹⁵

On appeal, the district court affirmed the IBLA’s decision.¹¹⁶ The court first concluded that it was not an abuse of discretion to grant a

the EIS should have included a “no action” alternative that would have precluded any drilling on the unit.

110. *Sierra Club*, 80 IBLA at 258.

111. *Id.* at 260.

112. *Id.* at 261.

113. *Id.* at 262.

114. Several factors supported the IBLA’s finding: it would have been unlikely that the operator could have secured a water source and installed a delivery system; prepared the drill pad; delivered and installed a drill rig; and been engaged in diligent drilling before expiration of the lease term. Road construction alone would have taken too long. In short, “there was no possibility that the unit operator could be diligently engaged in drilling on the lease before it expired. The only possible salvation of the situation lay in the hope that a lease suspension would be granted.” *Sierra Club*, 80 IBLA at 263.

115. *Sierra Club*, 80 IBLA at 264.

116. *Getty Oil Co. v. Clark*, 614 F. Supp. 904 (D. Wyo. 1985).

suspension to preserve environmental values of the leased property.¹¹⁷ Next, the court rejected an analogy to *Copper Valley*, drawing the distinction between a suspension directed by the Secretary, as in *Copper Valley*, and one granted upon request.¹¹⁸ The court then explained that, since it would not have been an abuse of discretion to have denied the suspension application, it was not an abuse of discretion to have conditioned the granting of the suspension.¹¹⁹ The court emphasized that the environmental concerns made it evident that delay was foreseeable and that operations could not be expected without a lease suspension.¹²⁰ Finally, the court observed that, "[w]hile it is conceivable that under some circumstances a delay imposed by the Secretary could be so severe that a denial of a request for lease suspension would constitute an abuse of discretion, this is not that case."¹²¹

The diligence and other requirements under FCLAA are only suspended as long as the suspension remains in place. The BLM's regulations contemplate that the authority to terminate suspensions is coterminous with the authority to grant or deny suspensions,¹²² thus suggesting that the Department exercises discretion when deciding whether to terminate a suspension already granted. But arguably any decision to terminate a suspension cannot be arbitrary, capricious, an abuse of discretion or not in accordance with law.¹²³

V. FAILED PROMISE OR MISGUIDED ASSUMPTIONS

The implementation of FCLAA appeared doomed almost from the outset. When FCLAA became law, the existing federal program was in disarray; the Interior Department had been operating under its moratorium for several years; it had only recently promulgated final regulations that attempted to facilitate coal development; and the new leasing program became embroiled in turmoil over whether the federal government was receiving fair market value for its leased coal.¹²⁴ This tur-

117. *Id.* at 915.

118. *Id.* at 917.

119. The Supreme Court has indicated that federal agencies have broad authority to condition discretionary grants. *United States v. Alaska*, 503 U.S. 569 (1992).

120. *Getty Oil Co.*, 614 F. Supp. at 920.

121. *Id.* at 921.

122. 43 C.F.R. § 3483.3(b) (1995).

123. 5 U.S.C. § 706(2)(A) (1994).

124. See generally George C. Coggins & Doris K. Nagel, "Nothing Beside Remains":

moil prompted lawsuits, a congressional inquiry, a short-term halt on new leases,¹²⁵ analyses by the Office of Technology and Assessment and Congressional Research Service, as well as a report by what became known as the Linowes Commission (and the remarks by Interior Secretary James Watt regarding the membership of the Commission, which contributed toward his resignation).¹²⁶ Coupled with such stumbling blocks was litigation under the Surface Mining Control and Reclamation Act of 1977,¹²⁷ industry's efforts at opposing the application of the diligence requirements, and the environmental community's challenge to the new leasing program.¹²⁸

Shortly after the Interior Department published its final rules implementing the new Federal coal management program, parties challenged the new program in court. These broad challenges lay somewhat dormant once Congress suspended most regional coal leasing in September of 1983, with the Department following along administratively. The Department once again reviewed its entire federal coal leasing program and prepared new environmental documents. Finally, in 1986, the Secretary issued a "Secretarial Issue Document" (SID) and resumed leasing.¹²⁹ Following the release of the SID and, essentially, the re-

The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy, 17 B.C. ENVTL. AFF. L. REV. 473, 527-532 (1990); C. Peter Goplerud, III, *Federal Coal Leasing and Partisan Politics: Alternatives and the Shadow of Chadha*, 86 W. VA. L. REV. 773 (1984); David A. Gulley, *The Fair Market Value of Federal Coal*, 86 W. VA. L. REV. 741 (1984).

125. Department of the Interior and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-146, 97 Stat. 919, 937.

126. Coggins & Nagel, *supra* note 124, at 527-32; GOPLERUD, *supra* note 124; Gulley, *supra* note 124; Martin, *supra* note 19, at 691-92. The Commission was established by Congress in the Supplemental Appropriation Act, 1983, Pub. L. No. 98-63, 97 Stat. 301, 328. See REPORT OF THE COMM'N, FAIR MARKET VALUE POLICY FOR FEDERAL COAL LEASING (1984).

127. *E.g.*, *Hodel v. Indiana*, 452 U.S. 314 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). See generally GOPLERUD, *supra* note 19, at 55-64; L. Thomas Galloway & Thomas J. Fitzgerald, *The Bonding Program Under the 1977 Surface Mining Control and Reclamation Act: Chaos in the Coalfields*, 89 W. VA. L. REV. 675 (1987).

128. Writing in 1978, then Solicitor Krulitz observed that "[t]he errors and omissions of previous policies are legion, and have left us with a legacy of procedural difficulties, court orders, and substantive deficiencies to overcome." Krulitz, *supra* note 22, at 139. This state of affairs simply continued.

129. The Secretary had considered four options, and in February of 1986 decided: (a) to initiate new lease sales in areas where RMPs had been completed; (b) resume all sus-

sumption of leasing, the program again became embroiled in litigation before Judge Bryant in *Natural Resources Defense Council v. Jamison*.¹³⁰

The plaintiffs' restructured lawsuit claimed that the leasing program, as set forth in the 1986 SID, had six flaws. It allegedly violated: (1) the land use planning requirements of both FCLAA and Federal Land Policy and Management Act of 1976 (FLPMA);¹³¹ (2) SMCRA by not including "reclaimability" in the unsuitability criteria; (3) FLPMA's public participation procedures; (4) FCLAA's ten-year diligent development requirement; (5) FCLAA's requirement for submitting a three-year R2P2; and (6) SMCRA's requirement for leasing only with the consent of a qualified surface owner.¹³² The court responded first by explaining that the coal lease sales must be compatible with a "comprehensive" land use plan, but that Congress had not defined the term "comprehensive." The court accepted the "generally recognized" view that the FLPMA's planning requirements satisfy the FCLAA requirement.¹³³ However, where RMPs under FLPMA have not been developed, the court indicated that the plaintiffs could not challenge the failure to develop an RMP. Instead, each individual land use plan would have to be examined to determine if it was "comprehensive."¹³⁴

pendent lease sales based upon the land use plans then in effect; and (c) to allow emergency leasing, leasing by application, and PLRA processing to proceed based on MFP amendments. See *Natural Resources Defense Council, Inc. v. Jamison*, 815 F. Supp. 454, 457-61 (D.D.C. 1992). In December, 1985, the Bureau of Land Management issued Instruction Memorandum No. 86-159, adopting guidelines for diligent development and continued operation, with an expiration date of September 30, 1986.

130. 815 F. Supp. 454 (D.D.C. 1992). The parties in *Natural Resources Defense Council, Inc.* have been engaged in settlement discussions during the pendency of the appeal.

131. See *supra* notes 49-50 and accompanying text.

132. *Natural Resources Defense Council, Inc.*, 815 F. Supp. at 458.

133. *Id.* at 460. The court used what it described as "indirect" legislative history to support this view. FLPMA's planning provisions require the development of RMPs, to replace older pre-FCLAA and pre-FLPMA planning documents called Management Framework Plans. Regulations promulgated in 1979, however, required that the MFPs be replaced with valid RMPs by December 31, 1984, but until such time they would be amended by enumerated criteria set forth in regulations. *Id.* at 460 n.30, 461 n.33. These regulations were superseded by the adoption of new comprehensive regulations in 1982. 47 Fed. Reg. 33,114 (1982). The 1982 regulations allowed coal leasing to occur if consistent with an MFP, up until the MFP was replaced by an RMP — with no deadline imposed. *Id.* at 461. The next year, however, the Department of Interior indicated that it intended to develop RMPs "as rapidly as possible." *Id.* at 461 n.38.

134. *Natural Resources Defense Council, Inc.*, 815 F. Supp. at 462. This meant that

The court then addressed the plaintiffs' separate argument that FLPMA required that all MFPs be replaced by RMPs, and that the Interior Department unlawfully delayed replacing those old management plans.¹³⁵ The court exhibited concern with the Department's delay in preparing RMPs, but declined to rule in the context of the cross-motions for summary judgment until additional information was presented.¹³⁶ Instead, it ordered the Department to furnish a schedule for completing various RMPs. Next, the court rejected the plaintiffs' argument that examining reclaimability during an unsuitability review under SMCRA must occur during a planning stage decision by the Department.¹³⁷ But Judge Bryant added that "[t]he current regulatory scheme is not ideal."¹³⁸ He also agreed that the Department had to adopt regulations implementing the public participation procedures under FLPMA, regardless of the substance of any procedures followed by the agency in accordance with its handbook.¹³⁹ He further agreed that the Department could not grant an extension of FCLAA's requirement to file a 3-year R2P2 due to a *force majeure* event.¹⁴⁰ Finally, the court rejected the plaintiffs' remaining claims; first, that the ten-year diligent

FCLAA did not provide plaintiffs with the ability to challenge all MFPs as a class, regardless of the contents of those plans. *Compare* 44 Fed. Reg. 46,386 (1979) (ultimately requiring preparation of RMPs), *with* 47 Fed. Reg. 33,114, 33,118 (1982) (discussing reliance on MFPs).

135. *National Resources Defense Council, Inc.*, 815 F. Supp. at 462.

136. *Id.* at 462-65.

137. *Id.* at 467. SMCRA directs the Secretary to review "all federal lands to identify those areas where 'reclamation . . . is not technologically or economically feasible.' *Id.* at 466 (citing 30 U.S.C. § 1272(a)(2) (1994)). The Secretary must determine such unreclaimable areas 'unsuitable for all or certain types of surface coal mining operations.' 30 U.S.C. § 1272(b)." *National Resources Defense Council, Inc.*, 815 F. Supp. at 466. Unless the United States exchanges these unsuitable coal tracts for other comparable coal reserves, lessees holding such lands argue that they must be compensated. For example, in *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), the court upheld a trial court's determination that SMCRA's prohibition on surface mining of alluvial valley floors constituted a taking of the company's coal property, with a value of over \$60 million. Similarly, after Wyoming's Department of Environmental Quality ruled that certain of Texaco's coal lands in the Powder River basin near Lake De Smet could not be mined, and once efforts at an exchange failed, the company filed a "takings" claim under the Fifth Amendment to the United States Constitution. The case was settled during the summer of 1995 for \$24 million. Nadia White, *Texaco Wins \$24 Million in Takings Suit*, CASPER STAR-TRIB., Nov. 4, 1995, at A1.

138. *National Resources Defense Council, Inc.*, 815 F. Supp. at 468.

139. *Id.* at 468-69.

140. *Id.* at 470-71. *See supra* note 67.

development requirement applied to pre-FCLAA leases that had not yet been readjusted under FCLAA,¹⁴¹ and second, that the regulations did not adequately protect qualified surface owners.¹⁴²

While the environmental community pressed its concern with the leasing program,¹⁴³ and as Congress and others questioned whether the Government was receiving fair market value for its leases,¹⁴⁴ industry challenged FCLAA's application to pre-FCLAA leases. An initial question presented by FCLAA was whether the Act applied to leases issued prior to 1976. Clearly, Section 3 of FCLAA, by its terms, applied to pre-existing leases. However, the Interior Department also had concluded that it could apply FCLAA's royalty provisions and diligent development requirements to pre-FCLAA leases when those leases came up for readjustment.¹⁴⁵

141. *Id.* at 470.

142. *National Resources Defense Council, Inc.*, 815 F. Supp. at 471-72.

143. A group of environmental organizations also filed a lawsuit challenging the final regulations, 52 Fed. Reg. 46,469 (1987), implementing the SMCRA unsuitability review component of the leasing program. *See National Wildlife Fed'n v. Babbitt*, 24 ENVTL. L. REPORT 20,200 (D.D.C. July 30, 1993). Plaintiffs primarily argued that the unsuitability review must include "reclaimability" and wetlands impacts as criteria, claiming SMCRA, NEPA and APA violations. *Id.* The court held that its prior decision in *Jamison* decided against plaintiffs on the reclaimability issue, holding that reclaimability could be examined at the mine approval stage. *Id.* Strikingly, however, the court held that the agency's action under an Executive Order on wetlands was subject to judicial review, and it found "serious defects in the process by which the Secretary made the February 1986 decision to resume coal leasing under the 1982 program without adding a wetlands unsuitability criterion." *Id.* The district court's decision was appealed, but it was then dismissed under the terms of a settlement.

144. *See supra* note 126 and accompanying text.

145. "The Department decided as a matter of policy in 1976 to readjust pre-FCLAA leases to conform to the provisions of the FCLAA, and the question of whether that policy is legally compelled has not been fully analyzed." Solicitor's Opinion M-36939, *Whether Leases Issued Prior to August 4, 1976, Subject to Readjustment After that Date Must be Readjusted to Conform to the Federal Coal Leasing Amendments Act of 1976*, 88 I.D. 1003 (1981). Five years later, an opinion by Interior's Solicitor William H. Coldiron analyzed the efficacy of the policy, determining that the new royalty and production requirements were mandatory and had to be included in all pre-FCLAA leases upon readjustment. *Id.* at 1012.

Of course, any other conclusion would have eviscerated the Act. As Solicitor Coldiron noted, then Congressman Max Baucus explained that only a relatively few of the existing federal coal leases had produced any coal and only approximately half of the western leases had any production plans for prior to 1990. *Id.* at 1010. "The purpose of the lease readjustment is to bring existing leases into conformity with statutes passed and policy changes made since their issuance." 47 Fed. Reg. 33,114, 33,129 (1982).

In *Rosebud Coal Sales Co., Inc. v. Andrus*,¹⁴⁶ the court of appeals accepted the lessee's argument that the Department could not readjust a lease and impose FCLAA requirements without having first given the lessee notice of the readjustment before the lease period expired.¹⁴⁷ In *Rosebud*, this meant that the Department could not readjust the lease, because it had given notice of the proposed readjustment over two years after the anniversary date of the lease. This decision necessarily precluded the Department from readjusting leases whose twenty-year period had expired shortly before or soon after the passage of FCLAA, particularly prior to the holding in *Rosebud*.¹⁴⁸

The decision in *Rosebud* was later "ameliorated" by the same court.¹⁴⁹ In *Trapper Mining Inc. v. Lujan*,¹⁵⁰ the court held that FCLAA automatically converts the twenty-year readjustment period in pre-FCLAA leases into a ten-year period at the first post-FCLAA readjustment date. In this case, for example, the leases were originally issued in 1958 and 1959, with a clause allowing for readjustment at every twenty-year interval and with the caveat "unless otherwise provided by law."¹⁵¹ The leases were assigned to Trapper Mining just shy of the first post-FCLAA ten-year readjustment date and the trigger of Section 3 of the Act.¹⁵² Trapper Mining and another lessee, Wyodak Resources Development Corp., argued that, because the Department had not sought timely readjustment of the leases in 1978 and 1979, it could not convert the original automatic twenty-year lease period into a FCLAA ten-year lease period. This was the teaching of *Rosebud*, ar-

146. 667 F.2d 949 (10th Cir. 1982).

147. *Id.* The court relied upon the federal coal lease and regulations, which together provided the lessor with the right to readjust the lease terms and conditions at the end of every twenty years. *Id.* at 950-51. The applicable regulations expressly provided that notice of a readjustment "will be given, whenever feasible, before the expiration of each such 20-year period." *Id.* at 951.

148. The BLM noted the effect of the *Rosebud* decision in the preamble to its rules. 47 Fed. Reg. 33,129.

149. GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 22.02[4][b][i], 22-15 (1994).

150. 923 F.2d 774 (10th Cir. 1991).

151. *Id.* at 776.

152. As in *Rosebud*, the BLM had failed to send a timely notice of readjustment before the expiration of the first twenty-year readjustment periods in 1978 and 1979. *Id.* Yet, here it would appear from the facts of the case that Trapper Mining acquired these leases possibly so that the former lessee would avoid Section 3's unwelcome effect, and it either knew or should have known that its leases were likely to be governed by FCLAA.

gued the lessees. But the court disagreed. Instead, it concluded that Congress both had the authority and intended to statutorily change the readjustment period.¹⁵³

By the time the court decided *Trapper Mining*, it had become almost certain that FCLAA would apply to leases issued prior to 1976 upon readjustment. In *FMC Wyoming Corp. v. Hodel*,¹⁵⁴ the Tenth Circuit already had upheld BLM's imposition of FCLAA's 12.5% royalty rate upon the August 1983 readjustment date of two coal leases which were issued in 1963 subject to a mere 17 1/2 cents per ton royalty payment.¹⁵⁵ In a companion case to *FMC*, the Tenth Circuit upheld BLM's imposition of the royalty rate for underground mines upon lease readjustment.¹⁵⁶ Similarly, in *Western Fuels-Utah v. Lujan*,¹⁵⁷ the District of Columbia Circuit Court held that the terms of FCLAA applied to pre-1976 leases at the time of their readjustment.¹⁵⁸ Furthermore, five months after *Trapper Mining*, the Ninth Circuit, in *Western Energy Co. v. United States*,¹⁵⁹ joined the other circuits in concluding that FCLAA applies to pre-1976 leases upon

153. *Id.* at 777-78. The court observed that the language of FCLAA was evident: The final sentence of § 6(a) states that leases will be subject to readjustment every ten years after the first twenty-year period ends. The provision is self-executing: the language is mandatory and directly imposes the new interval rather than just modifying the Secretary's authority over the term.

Id. at 779. And Congress reserved its authority to impose such new terms, particularly since the leases were subject to the proviso "unless otherwise provided by law." *Trapper Mining, Inc.*, 923 F.2d at 778.

154. 816 F.2d 496 (10th Cir. 1987).

155. BLM sent a timely notice of readjustment, before the twenty-year anniversary date of the leases. *Id.* at 499.

156. *Coastal States Energy Co. v. Hodel*, 816 F.2d 502 (10th Cir. 1987). The court also held that the royalty rate for underground mines could be reduced below the regulatory rate of 8% "if conditions warrant," and that BLM failed to consider whether conditions warranted a reduced rate. *Id.* at 507. This language was subsequently deleted from the regulations.

157. 895 F.2d 780 (D.C. Cir. 1990).

158. The court framed the question as follows: "whether the mandatory lease terms provided in § 207 apply to pre-1976 leases when they come up for readjustment after 1976." *Id.* at 784. In answering that it did, the court examined § 203 and that section's legislative history as evidence that "Congress intended § 207's 12.5% royalty rate to apply to pre-1976 leases" *Id.* at 787-88. The court, moreover, held that the readjustment of the royalty rate did not violate the Fifth Amendment, and that the Secretary of the Interior acted reasonably and consistent with FCLAA in determining the timing of the procedures used to readjust coal leases. *Id.* at 788-90.

159. 932 F.2d 807 (9th Cir. 1991).

readjustment, commenting that by now it was “not necessary to unduly burden the libraries of the country with extensive independent discussion of the issues.”¹⁶⁰

Now that FCLAA’s implementation has become somewhat settled — albeit after almost twenty years of overcoming hurdles in interpretation and administration,¹⁶¹ it is time to examine whether FCLAA will serve as sound policy guidance beyond its twentieth anniversary. Any thoughtful federal coal program should weave together in a consistent and coherent pattern aspects of federal energy, natural resources and environmental policy. In hindsight, it now appears that the anti-speculation provisions of FCLAA primarily reflected the goals of an early 1970s’ energy policy,¹⁶² which was premised, in part, upon encouraging increased federal coal production: a simple “use it or lose it” rule for federal coal lessees.

Such a philosophy assumed the need for increased production, some measure of consistency with the country’s emerging environmental policy, and either assumed or let energy policy define natural resource policy. But coal development is intrinsically linked to market demand, transportation availability and environmental controls.¹⁶³ FCLAA implicitly assumed a market demand that never fully materialized,¹⁶⁴ particularly as the nation’s fear of depleting its oil and gas reserves dissipated.¹⁶⁵ That assumption, coupled with the newly enact-

160. *Id.* at 808. These decisions led to the dismissal other pending cases. DEP’T. OF THE INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1991, at 6 (1992).

161. Judge Bryant poignantly commented that “[t]he federal coal leasing program has suffered continual upheaval for more than twenty years.” *National Wildlife Fed’n v. Babbitt*, 24 ENVTL L. REPORT 20,200 (D.D.C. 1993).

162. The same can also be said about the leasing program, to the extent the program reflects assumptions about leasing decisions based upon the need for coal, aside from concerns over the receipt of fair market value. *Cf.* Martin, *supra* note 19, at 1038 (discussing the 1979 program and its relationship to energy objectives).

163. *See* Horwitch, *supra* note 10, at 86-94. *See also* GOPLERUD, *supra* note 19, at 121-43 (“Transporting the Resource”); McClure, *supra* note 19, at 692 (“[t]ransportation costs represent anywhere from 50% to 70% of the final deliverable price of coal.”). Indeed, the utilities and coal producers waged a fierce battle against the railroads and the Interstate Commerce Commission, because of alleged insufficient protection from unfair rates imposed on captive coal shippers, protection arguably required by the Staggers Rail Act of 1980. *Id.* at 692-93. *See generally* Bagge, *supra* note 25, at 730-33.

164. For a description of the many inter-related reasons, as well as existing and proposed programs, that affected the national and international coal markets during the early 1980s, *see generally* McClure, *supra* note 19.

165. A similar scenario describes the passage of the Natural Gas Policy Act of 1978,

ed environmental controls in the 1977 Clean Air Act Amendments¹⁶⁶ and SMCRA,¹⁶⁷ as well as the problems associated with moving more western coal to market, left FCLAA with having little impact on federal coal production, at least until the mid 1980s.¹⁶⁸

Although FCLAA began to have an impact after the mid 1980s,¹⁶⁹ it was by that time just a footnote to the country's emerg-

with Congress enacting the natural gas part of the NEP "to cope with a severe natural shortage after the shortage had ceased to exist." Richard J. Pierce, Jr., *Reconstituting the Natural Gas Industry from Wellhead to Burnertip*, 9 ENERGY L.J. 1, 12 (1988).

166. See Bagge, *supra* note 25, at 722-27; see also BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); Peter Huber, *Electricity and the Environment: In Search of Regulatory Authority*, 100 HARV. L. REV. 1002, 1006 (1987) (describing the fluctuation between promoting coal as an energy policy and impeding the use of coal under the Clean Air Act).

167. See Bagge, *supra* note 25, at 727-30.

168. In 1985, Professor Dan Tarlock observed that:

As of 1984, federal coal still had not played a major role in meeting either total national energy supply demands or even in meeting total coal supply demands. Federal coal accounted for only twelve percent of the total United States production in 1982. The program has failed to coordinate coal development with other government objectives such as environmental protection. The program, moreover, has not achieved a satisfactory return to the federal treasury. All three branches of government must share the blame for failure of the federal coal program. The Department of the Interior's (USDI) attempts to develop a national coal leasing program failed in part because USDI could not agree on a set of workable and consistent conceptual underpinnings for the program. Administrative attempts also failed because of well-meaning but inept judicial intervention and political and economic events beyond the Department's control. Congress must also bear a good part of the blame. Congress never settled on a consistent coal use policy

Tarlock, *supra* note 10, at 351. Several years earlier, Tarlock had commented that:

The federal coal leasing program is ill adapted either to serve the nation's need for increased coal or to further legitimate environmental protection objectives. The program is based on bankrupt conceptual underpinnings, unattainable data requirements, and the lack of a clear objective as to benefits, environmental or otherwise, that will be gained by substituting planning for more modest regulation of the market.

Tarlock, *supra* note 20, at 338. Here, Professor Tarlock apparently was criticizing the planning process for deciding what areas to lease.

169. As of 1992, federal coal production had more than doubled since 1984, with most of the increases occurring in the states of Utah and Wyoming. DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1992, at 23. Yet, during that same period, BLM only issued 41 federal coal leases, for an average of 4.5 leases per year, while federal royalties more than quadrupled. *Id.* at 25, 28. By comparison, 105 federal coal leases were issued from FY 1978 through FY 1983. DEP'T INTERIOR, FED. COAL. MGMT. REPORT FISCAL YEAR 1991, at 24. According to Professor Coggins, therefore, "[w]ith two prominent exceptions, federal coal leasing has been moribund since 1976. Without drastic change in energy markets, prospects for renewed federal coal leasing on any substantial scale are dim." COGGINS & GLICKSMAN,

ing energy policy. In recent years, therefore, the focus on coal production has shifted to an emphasis on making coal an environmentally competitive resource, particularly after the Clean Air Act Amendments of 1990 and through the development of the Clean Coal Technology program.¹⁷⁰ Yet, FCLAA still remains one of the remnants of the NEP era, while many—if not most—of the NEP programs “have since proven unworkable or no longer necessary and have been abandoned.”¹⁷¹

VI. WHERE DO WE GO FROM HERE?¹⁷²

It seems only fitting that after so many years we should examine whether FCLAA remains a viable natural resource policy, considering both the more limited role of federal coal development to our nation’s present energy policy and the present emphasis on environmental issues associated with emissions from coal production. While it is beyond the scope of this article to undertake such an examination, the following considerations might help define the inquiry. In 1985, for instance, Professor Dan Tarlock suggested that the diligence requirements “are undesirable to coal lessees and society generally.”¹⁷³ Due diligence requirements are undesirable, according to Tarlock, because prospective lessees only bid for coal leases at their present development value rather than at their maximized future development value, and because

supra note 149, at § 22.03[1], 22-21.

170. See DEPARTMENT OF ENERGY, NATIONAL ENERGY STRATEGY: POWERFUL IDEAS FOR AMERICA ONE YEAR LATER 28-31 (1992). See generally REITZE, *supra* note 41, at 476-79; Donald A. Crane, et. al., *Coal and Emerging Energy and Environmental Policy*, NAT. RESOURCES & ENV’T 26 (Fall 1991); Linda G. Stuntz, *The National Energy Strategy*, NAT. RESOURCES & ENV’T 3 (Fall 1991).

171. Julia Richardson & Robert Nordhaus, *The National Energy Act of 1978*, NAT. RESOURCES & ENV’T at 8, 62 (Fall 1995).

172. This same question was asked back in 1976, by the Hon. Patsy Mink, who expressed the view, quite appropriately, that environmental and energy policy need not be at odds with one another, and thus she supported both SMCRA and encouraged increased coal development and production. Hon. Patsy T. Mink, *Energy and Environment: Which is Undermining Which?*, 9 NAT. RESOURCES LAW 19, 28 (1976).

173. Tarlock, *supra* note 10, at 358. It should be noted, however, that Professor Tarlock’s remarks were in the context of an essay and review of Dr. Robert Nelson’s book. NELSON, *supra* note 19.

such requirements “promote environmentally unsound development because they frustrate the assembly of unified leasing blocks. . . .”¹⁷⁴

But such a concern may suggest too much. First of all, it discounts a lessee’s ability to “hold” coal reserves through the establishment of an LMU, as well as to develop leases in an environmentally sound and efficient manner through “unified leasing blocks.”¹⁷⁵ Next, it is based upon a premise that all lands leased under a market driven approach are dedicated to commodity production and have no other value, presumably because the leasing process itself somehow reflected such a judgment.¹⁷⁶ Yet, many, if not most, of the currently leased lands were leased before the existing leasing program under FCLAA integrated the leasing process into land use planning.¹⁷⁷ It might be too naive to assume that allowing these lands to be held for speculative purposes is sound policy, presumably because no other potentially conflicting use — whether in the present or the future — is appropriate. It might be equally naive to assume that a coal tract having a higher development value in twenty years is even worth leasing today and will provide a fair return to the United States.¹⁷⁸

174. Tarlock, *supra* note 10, at 358.

175. When an LMU is being sought simply as a device to avoid the diligence requirements, such “holding” of coal reserves is not necessarily the best use of the natural resources. This is the concern expressed by the GAO and acknowledged by the Department. *See supra* notes 89-96 and accompanying text. “Approval of LMUs primarily to extend the life of a federal coal lease may result in a substantial loss of revenue to the federal government compared with reoffering the tract for lease.” MINERAL RESOURCES, *supra* note 57, at 30.

176. Tarlock, *supra* note 10, at 367-71.

177. *See supra* note 22; *see also* Leshy, *supra* note 18, at 496 (discussing the limited review for pre-FCLAA leased lands).

178. One might ask whether the converse holds true: that it is best for the United States to hold the tracts until such time as the tracts are likely to be developed and thus needed in the market? The answer that Professor Tarlock seems to accept, although it is not clear if he is just relaying Dr. Nelson’s views, is that these tracts have no other value to the United States. Tarlock, *supra* note 10, at 367-71. In 1984, the Linowes Commission, addressed whether the diligent development requirement should be retained and recommended that it should, but subject to a ten year extension upon payment of advanced royalties. REPORT OF THE COMMISSION, *supra* note 126, at 299. The Commission explained that while the diligent development requirements allowed each generation to make its decision on the use of the resource, it also created certain perverse incentives and was somewhat unrealistic in light of the changed market and environmental controls. *Id.* at 292-99. In 1985, the Bureau of Land Management expressed a concern with the diligent development requirements. *See* USDOl, ANALYSIS OF OPTIONS FOR AMENDING THE MINERAL LEASING ACT SECTIONS 2(a)(2)(A) and 7 (September 1985).

Additionally, it has yet to be shown whether a market-based approach to leasing, unconstrained by any due diligence requirements, could be supported by empirical evidence. At the very least, one would have to understand and analyze several issues. For example, allowing speculative holdings of leases assumes that the discounted future value of present leases being purchased for “speculative” or even future reserves will bring a fair return to the United States. But one would need to examine whether the value of excess reserves being held for possible future market demand exceeds the likely discounted net present value that the United States would likely receive from such leases in the future.

Of course, this analysis may be affected by the holding costs of federal leases — that is, the amount of annual rentals that lessees must pay. And such holding costs might be avoided in instances where a lease has been suspended. Furthermore, the analysis would be influenced by the nature of the western coal markets and the type of contracts being offered by western utilities. These factors all suggest that anti-speculative and diligence requirements are important elements to a sound natural resource policy, absent any credible evidence indicating that the United States is not recovering sufficient economic return on lands that through a comprehensive land use process have been determined to be useful for nothing else.

VII. CONCLUSION

Twenty years later, with the federal coal program apparently emerging from its tumultuous past, FCLAA’s twentieth anniversary should serve as a reminder of where the program has been and where it is today. Yet, quite possibly, it is also time to explore where it should go from here. Looking back, it appears that FCLAA endorsed an energy policy whose climate has since changed. Even when it was enacted, FCLAA never fully integrated any viable energy policy with a sound natural resource and environmental policy.

Indeed, Congress passed FCLAA before it could agree on the passage of environmental controls, whether for the development or production of coal. Perhaps the irony is that FCLAA built upon the Department’s previous efforts under the MLA, but it assumed those efforts would work. But this is not to suggest, as some have done, that FCLAA cannot be justified. The various provisions designed to avoid

speculative holdings have contributed toward lease relinquishments and terminations,¹⁷⁹ thereby allowing comprehensive natural resource policy objectives to ultimately determine whether, and for how much, publicly owned coal resources should be leased.

179. As of September 30, 1992, for example, there were only 449 federal coal leases. DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1992, at 16. This is a decrease from over 565 leases in 1980, with thirty of those leases issued after FCLAA. OTA, *supra* note 59, at 238. From FY '92 through FY '90, thirty-nine leases were terminated, while over 100 leases were relinquished between FY '83 and FY '87. *See* DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1987, at 74; DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1990, at 20; DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1991, at 18; DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1992, at 16. In fact, in the FY '88 report, the Department predicted that 55 leases could terminate between then and 1993, because of a failure to produce in commercial quantities within ten years. DEP'T INTERIOR, FED. COAL MGMT. REPORT FISCAL YEAR 1988, at 49.